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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA)
)
vs.) No. 1:CR-18-3495 JCH
)
DOUGLAS SMITH)

TRANSCRIPT OF PROCEEDINGS
MOTIONS HEARING (via Zoom)
November 5, 2020

BEFORE: HONORABLE JUDGE JUDITH HERRERA
UNITED STATES DISTRICT JUDGE

Proceedings reported by stenotype.
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1 THE COURT: All right. We're on the record
2 in USA versus Douglas Smith. The case number is
3 CR-18-3495.

4 And can I have appearances, please, before
5 we get into who all is participating today?

6 MR. NAYBACK: Good morning, Your Honor.

7 Kyle Nayback on behalf of the
8 United States. I'm with my colleague Novaline
9 Wilson. And we'll be sharing motions and witnesses
10 on and off, if that's okay.

11 THE COURT: Thank you.

12 MR. ELSENHEIMER: Good morning, Your Honor.

13 Aric Elsenheimer on behalf of Mr. Douglas
14 Smith.

15 We are in the Mimbres courtroom. I'm
16 joined by my colleague, Amanda Lavin and a paralegal
17 with the federal public defender's office.

18 And Mr. Smith is with us here in the
19 courtroom.

20 Your Honor, before we go -- because we're
21 in the courthouse, as I understand there is a court
22 order that requires that we wear masks. If we're
23 sitting at counsel table, we will be wearing masks.
24 But can I have the Court's permission to not wear a
25 mask while I'm speaking, or whomever is speaking?

1 Would that be all right?

2 THE COURT: That's fine. Can you just let
3 me know if you're properly distanced from other
4 people at that point or...

5 MR. ELSENHEIMER: We are from Doug Smith.
6 But we -- we're doing our best to stay as far away as
7 we can. Probably not six feet from my colleague.
8 But...

9 THE COURT: Well, if those who are not
10 speaking wear masks, maybe we can try to...

11 MR. ELSENHEIMER: They do have masks on.

12 THE COURT: All right. Okay. Thank you.
13 Now, I don't see the defendant. But you
14 said he's in the courtroom with you.

15 Is that correct?

16 MR. ELSENHEIMER: He is. Yes, Your Honor.
17 Let me have him come up to the -- he is here.

18 THE COURT: As long as you put on the
19 record that he's there, that's fine.

20 So, Mr. Nayback, tell me who else is
21 observing or participating in this hearing.

22 MR. NAYBACK: Thank you, Your Honor.

23 The first witness we intend to call is
24 Saige Libertore, who you see on your screen, I
25 believe.

1 The second witness is Theodore Chavez, who
2 you see on your screen. He's presenting from our US
3 Attorney's office in Tulsa, Oklahoma, Conference Room
4 561.

5 And then I believe we have -- I don't see
6 their names, but a couple of FBI supervisors
7 observing. Eric Smith and Jim Adar. Those are the
8 four witnesses and/or participants that should be
9 allowed on behalf of the United States.

10 Thank you.

11 THE COURT: All right. Mr. Elsenheimer, do
12 you have any witnesses or observers?

13 MR. ELSENHEIMER: We have three observers,
14 Your Honor.

15 The first observer is Ms. Shaley Klein.
16 I'm sorry. It shows up on the screen as S. Klein.
17 Shaley Klein is a paralegal intern with our office.

18 Also joining us is Corina Titus. She's an
19 investigator with our office.

20 And lastly, I believe it's Verenees -- I
21 think it's Pernia. I can't see the full name. But
22 that's somebody who our colleague, Kari Converse --
23 someone who asked our colleague Kari Converse if --
24 if that person can observe a hearing. And this was a
25 hearing that was on the calendar. So...

1 THE COURT: All right. Very good.

2 Well, we're here today to take up several
3 motions. Let me tell you that you have my undivided
4 attention all morning, but I need to try to get this
5 wrapped up before we break for lunch. Hopefully we
6 break for lunch at noon. But if it's a little -- if
7 it goes a little bit longer I can accommodate that,
8 but we need to -- we need to be -- I don't have the
9 afternoon available. So hopefully that works with
10 your -- with your plans.

11 So I think we should begin with the motions
12 that require testimony.

13 So let me ask: Are you ready to proceed,
14 Mr. Nayback?

15 MR. NAYBACK: I am, Your Honor. And we
16 would -- I'm glad you suggested that. We were hoping
17 to call Saige Libertore first. I don't think she's a
18 lengthy witness, at least from our perspective.

19 And then Theodore Chavez second. And he is
20 the trajectory expert.

21 Ms. Libertore put the model together, and
22 so those are the respective motions that we were
23 having them testify about.

24 So we would be happy to start with
25 Ms. Libertore whenever the Court is ready.

1 THE COURT: All right. Is that all right
2 with you, Mr. Elsenheimer? My suggestion that we
3 begin with testimony, to the extent we can get that
4 done. I'd like to be sure that we get that done this
5 morning. If what is left after that is oral
6 argument, I feel like I can accommodate that more
7 easily.

8 So, okay with you?

9 MR. ELSENHEIMER: That's certainly fine
10 with me.

11 THE COURT: All right.

12 MR. ELSENHEIMER: Your Honor?

13 THE COURT: Yes.

14 MR. ELSENHEIMER: We would invoke the rule
15 for purposes of this hearing.

16 THE COURT: So are there any witnesses that
17 are observing that are not expert witnesses or case
18 agents?

19 MR. NAYBACK: Not on behalf of the
20 United States, Your Honor.

21 THE COURT: All right. So this being a
22 video conference hearing it's, I guess, easier for us
23 to keep track of who is observing.

24 But to the extent there is a witness that
25 I'm not aware of, I will require that that witness

1 remain outside of the hearing process. So -- because
2 the rule has been invoked.

3 So all right. Well, then, I assume,
4 Mr. Nayback, you're putting on the first witness, not
5 Ms. Wilson?

6 MR. NAYBACK: You are correct, Your Honor.
7 Thank you.

8 THE COURT: All right. You may proceed.

9 MR. NAYBACK: Thank you.

10 The United States calls Saige Libertore to
11 the virtual witness stand.

12 THE COURT: Let me just state also, for the
13 record, that we are doing all of this by Zoom video
14 conference. The defendant is participating. I -- to
15 the extent the defendant has a right to an in-person
16 hearing on a motion to suppress or these various
17 motions, I am operating under the assumption that the
18 defendant has waived personal appearance.

19 Is that right, Mr. Elsenheimer?

20 MR. ELSENHEIMER: He is willing to waive
21 the personal appearance. We haven't had him fill out
22 a form yet, but we will give that to the Court.

23 THE COURT: All right. Thank you.

24 So we are ready for the witness to take the
25 virtual witness stand.

1 Thank you. And my clerk will administer
2 the oath.

3 SAIGE LIBERTORE, GOVERNMENT'S WITNESS, SWORN

4 DIRECT EXAMINATION

5 BY MR. NAYBACK:

6 Q. Miss, will you state and spell your full name
7 for the record?

8 A. Saige Libertore, S-A-I-G-E, L-I-B-E-R-T-O-R-E.

9 Q. Where do you work?

10 A. I work for the FBI laboratory in Quantico,
11 Virginia.

12 Q. What is your title?

13 A. I's am a visual information specialist.

14 Q. Can you tell the Court a little bit about your
15 job description?

16 A. Yeah. So I go out and I document crime scenes
17 with total station, scanning, photography, enhanced
18 sketching, and I bring that data back to the
19 laboratory, and I use it to reconstruct said crime
20 scenes.

21 Sometimes I'll reconstruct evidence as
22 well. And that is peer reviewed, supervisor
23 reviewed, and then we give it to the case agent or
24 whoever requested it.

25 Q. Can you describe your educational background?

1 A. Yes. I graduated with a bachelor's degree from
2 Ringling College of Art and Design in Sarasota,
3 Florida, in 2017.

4 Q. Can you talk a little bit about your training
5 on the job at the FBI?

6 How do you learn how to put these crime
7 scene models together?

8 A. So the bureau -- the FBI, they provide training
9 through classrooms. And then once you have the basic
10 understanding of the programs that we use and the
11 techniques, we then go on to shadow senior visual
12 information specialists, both in the laboratory and
13 on scene.

14 And after a little while, once it's
15 determined that you understand our process, then
16 we're able to go out on our own with the rest of our
17 team and collect that data on our own.

18 Q. You touched on this briefly. But can you
19 explain, when you do work on a model, how is it
20 reviewed by supervisors and other peers?

21 I mean, are they just looking at it or are
22 they cross-checking measurements? Are they
23 interviewing you?

24 A. All of the above. So as the model is
25 progressing, they come through at various milestones

1 and they will take measurements. They will look at
2 the data that I'm taking my measurements from, and
3 they will just double and triple check that I'm doing
4 everything correctly, that the scale conversions are
5 accurate.

6 And once everything is complete, we'll have
7 another peer review it. And then a supervisor comes
8 in, and he does his own review before it's shipped
9 off.

10 Q. Okay. Ms. Libertore, I'm going to show you
11 some exhibits. Would you please let me know verbally
12 whether you can see those when they come up on your
13 screen?

14 A. Of course.

15 There we go.

16 Q. Ms. Libertore, I'm showing you what I believe
17 is Government's Exhibit 1 on your screen.

18 Do you see that?

19 A. I do.

20 Q. Okay. Do you recognize what's in that
21 photograph?

22 A. Yes. That is the model that I constructed.

23 Q. Is it a fair and accurate depiction of the
24 model, as it left the FBI, before you sent it to
25 New Mexico?

1 A. Yes.

2 MR. NAYBACK: Your Honor, I move for
3 admission of Government's Exhibit 1, just for
4 purposes of this hearing.

5 THE COURT: All right. Let me just -- I
6 have received a binder of exhibits from -- that's
7 labeled "United States Superseding Exhibits for
8 Motions Hearing on November 5."

9 And I -- I see a Government Exhibit 1 that
10 I -- I just want to be clear for the record. There
11 is a Government's Exhibit 1 that is attached to
12 Theodore J. Chavez's -- well, it is Theodore Chavez's
13 CV or resume.

14 And so I just want to make sure that the
15 book that I have, that has two different exhibits
16 marked Government's Exhibit 1. I just want to make
17 the record clear, because I also have Government's
18 Exhibit 1 as this photograph.

19 So I've got two Government Exhibit 1s in
20 this notebook.

21 MR. NAYBACK: I apologize, Your Honor.
22 That -- that's on me.

23 There are three exhibits attached to
24 Document 73, and they are listed as Government's
25 Exhibits 1, 2, and 3.

1 So you wouldn't find them necessarily in
2 the binder; but they're, rather, attachments to
3 Doc 73. And it's actually -- the title of Doc 129 is
4 "Notice of Filing of Superseding Exhibits in Support
5 of Motion in Limine to use Demonstrative Exhibits at
6 Trial."

7 So I apologize for the confusion. If
8 you'll let me know when I may proceed, or when the
9 Court has located it.

10 THE COURT: All right. I just want to make
11 sure that the record is clear.

12 So I'm with you. You may proceed.

13 Let me ask Mr. Elsenheimer, is there any
14 objection to Government's Exhibit 1 for purposes of
15 this hearing?

16 MR. ELSENHEIMER: Not for purposes of this
17 hearing, Your Honor.

18 THE COURT: All right. So for purposes of
19 the hearing, Government's Exhibit 1 is admitted.

20 MR. NAYBACK: Thank you.

21 BY MR. NAYBACK:

22 Q. And, Ms. Libertore, can you see the next
23 exhibit, Government's Exhibit 2?

24 Does that show on your screen?

25 A. I think this is 3.

1 Q. Okay. Is that 2?

2 A. That's 2, yes.

3 Q. Okay. And is this also a photograph of the
4 model that you created?

5 A. It is.

6 Q. A fair and accurate depiction?

7 A. It is.

8 MR. NAYBACK: I move Government's 2,
9 Your Honor.

10 THE COURT: Mr. Elsenheimer, any objection
11 for the purposes of the hearing today?

12 MR. ELSENHEIMER: No, Your Honor.

13 THE COURT: All right. Government's
14 Exhibit 2 is admitted.

15 MR. NAYBACK: Thank you, Your Honor.

16 BY MR. NAYBACK:

17 Q. And Government's Exhibit 3, Ms. Libertore, do
18 you recognize it?

19 A. I do.

20 Q. Does it appear to be a close-up shot of the
21 model that you created?

22 A. It is.

23 Q. A fair and accurate depiction of the actual
24 model?

25 A. Yes.

1 MR. NAYBACK: I move 3, Your Honor.

2 THE COURT: Mr. Elsenheimer, any objection?

3 MR. ELSENHEIMER: No, not for purposes of
4 this hearing.

5 THE COURT: All right. Government's
6 Exhibit 3 will also be admitted for today's hearing.

7 BY MR. NAYBACK:

8 Q. So, Ms. Libertore, I'm going to leave these up
9 just for a minute and ask you a little bit about
10 them.

11 But can you talk about -- when you get an
12 assignment from a case agent or from a US Attorney's
13 office, can you explain to the Court how you go about
14 creating a smaller version of an actual -- of an
15 alleged crime scene?

16 A. Yes. So I will typically receive an assignment
17 from a case agent, and they will discuss that they
18 want a representation of a crime scene.

19 So either I will receive data that has
20 already been collected, or I will go out with a team
21 and collect it myself. And once that data comes back
22 to the lab, I will use it to create a scaled down
23 version.

24 So with this one in particular, the data
25 had already been collected. So I used the total

1 station measurements and the scan data, as well as
2 some photography and aerial imagery, scaled it down
3 to 5/16 scale, and then built it from there.

4 Q. How do you decide what scale to use?

5 A. This one, it had been decided by another visual
6 information specialist, so I stuck with that scale.

7 But typically, we will just decide -- it
8 has to fit through doors, so usually we keep it under
9 35 inches wide. That's important to keep in mind.

10 And with this one, it worked out in the
11 5/16 scale simply because of the scope of the model
12 and the structures that needed to be included.

13 Q. Okay. So can you describe what is in the
14 bottom left? It looks like a little placard. On
15 this photograph, it looks like it's on the model as
16 well.

17 Can you describe, if you can read it,
18 basically what that says so the Court knows?

19 A. Yes. So that is an end plate, and it just has
20 the address of where the scene is located. And it
21 has the scale itself, so it will have the name of it.
22 So 5/16 scale. And then it also has a ruler, so it
23 can be checked by someone, and a north arrow
24 indicator so people can orient themselves.

25 Q. And can you explain how this scale worked?

1 5/16 of what is equal to a foot of what?

2 A. So 5/16 of an inch is 1 foot. And the scale
3 conversion factor for that is .026. So when you're
4 taking the measurements from a one-to-one scale, you
5 would just multiply the inches by 0.026, and you will
6 arrive at the 5/16 measurement.

7 Q. A few minutes ago you explained that you were
8 using data taken by a total station and photography.

9 Can you go a little bit more into depth as
10 to your experience reading total station data and
11 kind of what total station data is?

12 A. Of course. So we collect total station data at
13 almost every scene that we deploy to. And it's a
14 very popular survey data collecting method, where two
15 operators will choose certain points, whether those
16 are evidence, buildings, cars, bullet holes. And
17 it's all shot into something that can be
18 geo referenced and placed back into a measurement.

19 And we use that to build the bones of the
20 crime scene and also place evidence, place vehicles,
21 place structures, and you can take measurements from
22 that.

23 Q. Okay. And then I see here in the model you
24 also have a number of trees and bushes which may or
25 may not be important in this case.

1 Can you explain to the Court whether those
2 are to scale as well?

3 A. They are. So they -- vertically, you know,
4 they -- I can't measure exactly how tall they are.
5 But I know that they are placed exactly where they
6 need to be, simply because the FARO scanner collected
7 everything in place. And that is very similar to a
8 total station, except instead of choosing a few dozen
9 points, you're choosing millions.

10 So each of those is measured, and I used
11 that data to place the foliage.

12 Q. Why is the FBI asked to make models of crime
13 scenes? Is that helpful in some way?

14 A. It's very helpful to juries and witnesses, to
15 place themselves back in the scene. You know, a
16 picture is worth a thousand words, but a model is
17 worth a million, simply because it puts things into
18 three-dimensional reality. And you know we may get
19 there eventually, but 3D digital is a little bit
20 disarming for some people. So -- especially for
21 witnesses who have a difficult time understanding
22 exactly where they were when the situation took
23 place.

24 It's just very helpful for people to place
25 themselves back into the scene.

1 Q. Final question, Ms. Libertore.

2 Are you confident that this model fairly
3 and accurately represents the alleged crime scene in
4 this case?

5 A. I am.

6 MR. NAYBACK: I'll pass the witness,
7 Your Honor.

8 THE COURT: All right. Thank you.

9 Mr. Elsenheimer, you may cross-examine the
10 witness.

11 MR. ELSENHEIMER: Thank you, Your Honor.

12 Can I ask the government to unshare their
13 screen? Maybe they already did.

14 THE COURT: They did.

15 MR. ELSENHEIMER: Thank you.

16 CROSS-EXAMINATION

17 BY MR. ELSENHEIMER:

18 Q. Good morning, Ms. Libertore.

19 A. Good morning.

20 Q. So did you ever visit the address at
21 825 Riverside Drive in Espanola?

22 A. No.

23 Q. You never personally visited that location?

24 A. No, I've never been there.

25 Q. Who was -- who was it that went there to

1 collect the data?

2 A. It was the Albuquerque evidence response team
3 from the FBI.

4 Q. And do you know who that consisted of in this
5 case?

6 A. I would have to look up the names.

7 Q. Do you know when they visited the property at
8 825 Riverside Drive in Espanola to collect the data?

9 A. I don't have the date of that, but I could get
10 it for you.

11 Q. Do you have it available, readily available?

12 A. Not readily. I'd have to go to the office.

13 Q. You're not in the office right now?

14 A. No, sir.

15 Q. Okay. So how long -- well, do you know the
16 date of incident of the alleged -- of the allegations
17 in this case?

18 A. I only know the [audio cutting out] date. But
19 I --

20 Q. What do you know that to be?

21 A. It was just a time stamp. But I would much
22 rather get the actual date for you.

23 Q. And do you have that information readily
24 available?

25 A. Again, that's in the office.

1 Q. Okay. Let me ask you this.

2 You said "time stamp." Are you referring
3 to a time stamp on the photographs that you looked
4 at?

5 A. Yes, sir.

6 Q. Okay. So that goes to my next question.

7 What -- let me ask you. Let's set aside
8 the data for a moment.

9 What other information did you look at to
10 familiarize yourself with this case?

11 A. I only looked at the scan data that was
12 collected, the total station data that was shot on
13 scene, and the photographs that were taken.

14 Q. And let me just -- the photographs that were
15 taken, are you referring to the photographs that were
16 obtained by the data collection team or photographs
17 obtained by other law enforcement officers at the
18 time of the incident?

19 A. The data collection team.

20 Q. Okay. So you haven't looked at anything from
21 any other law enforcement about photographs or -- or
22 documents relat- -- taken at or shortly after the
23 alleged incident in this case?

24 A. I also referenced an aerial imagery piece that
25 was pulled by the data collection team. So that

1 isn't specifically from the FBI. That would be
2 provided by Google Earth.

3 Q. Did you look at aerial data?

4 A. That would be the aerial data.

5 Q. Was there a drone or air- -- some type of
6 aircraft?

7 A. Not that I'm aware of.

8 Q. And you didn't look at anything that was
9 collected by a drone?

10 A. No, sir.

11 Q. So you don't know when the data was collected?

12 A. I can get it to you.

13 Q. Do you -- and you don't know, off the top of
14 your head, the date of the incident in this case?

15 A. No, sir. Not off the top of my head.

16 Q. Okay. So off the top of your head, you don't
17 know how long it was between the date of the incident
18 and the date that the data was collected.

19 Is that right?

20 A. That's correct.

21 Q. Okay. Let me show you a few photographs, and
22 perhaps that will -- if there is a time stamp or a
23 date stamp, that will refresh your recollection.

24 Now, let me show you a photograph -- well,
25 let me first go back and -- and show you what I've

1 labeled as Defendant's Exhibit A.

2 And I think we've already discussed this,
3 but I have a couple of questions for you about it.

4 Are you able to see that, Ms. Libertore?

5 A. I am.

6 Q. Okay. And can you just tell me what that is?

7 A. That is the nameplate that we discussed that
8 has the address of the incident, as well as the scale
9 and the north indicator.

10 Q. And so you said that 5/16 equals -- of an
11 inch -- equals 1 foot.

12 You gave a decimal point. What was the
13 decimal number you gave?

14 A. That is 0.026.

15 Q. And that's the conversion of 5/16 of an inch?

16 A. That is the scale conversion for model makers.

17 Q. Okay. So if one were to try to ascertain what
18 the scale is, we would take the -- let's say we were
19 looking at Point A to Point B, and there is 20 feet
20 between Point A to Point B.

21 To get the scale conversion we would take
22 20 feet -- 20, and we would multiply that by 0.026.

23 Is that right?

24 A. You would have to convert the feet to inches
25 first, and then multiply the inches by .026.

1 Q. I see. So it would be 20 times 12 times .026?

2 A. Yes.

3 Q. Okay. Thank you.

4 MR. ELSENHEIMER: Your Honor, I move
5 Defendant's Exhibit A.

6 THE COURT: Is there objection?

7 MR. NAYBACK: No objection.

8 MR. ELSENHEIMER: For purposes of this
9 hearing.

10 THE COURT: Exhibit A is admitted.

11 MR. ELSENHEIMER: Thank you.

12 BY MR. ELSENHEIMER:

13 Q. Ms. Libertore, let me show you
14 Defendant's Exhibit B.

15 And this -- can you tell us what this is?

16 A. Yes, sir. That is the model that I
17 constructed.

18 Q. What is the directional -- so what is -- what's
19 the north, south, east, west, as it relates to this
20 model?

21 A. North would be to the right. So if we're
22 looking at the corner that's closest to us, on the
23 right side, that is the north side of the model.

24 Q. So the corner that it is closest to the bottom
25 of the screen --

1 A. Uh-huh.

2 Q. -- would be the north side of the model?

3 A. Yes, sir. The side to the right of that
4 corner.

5 Q. Okay. Okay.

6 And now this particular model, there is --
7 just in from that north corner, there's a building or
8 the model of the building with a metal -- what
9 appears to be kind of a silver roof.

10 A. Uh-huh.

11 Q. What was -- what's your understanding of what
12 that building is?

13 A. That is, from my understanding, the residence
14 of the defendant.

15 Q. And that particular image right there, though,
16 is missing a separate building.

17 Is that right?

18 A. Yes, sir.

19 Q. And what building is it missing?

20 A. I'm not sure. It wasn't in my data.

21 Q. Well, let me show you Defendant's Exhibit B,
22 and then I'll come back to -- actually, I'm sorry, D.

23 I'm sorry. Let me show you Defendant's
24 Exhibit E.

25 So do you recognize this image here?

1 A. I've never seen this image before, but I do
2 recognize that that is the crime scene.

3 Q. Okay. And if we are looking at this particular
4 image, this would be -- the north would be to the
5 right of the image?

6 A. Yes, sir.

7 Q. And -- and is it right -- I just want to make
8 sure we're oriented.

9 Is it correct to say that the driveway and
10 the road are to the bottom of the image?

11 Is that correct?

12 A. Correct.

13 Q. And I'm going to put this image next to a prior
14 image.

15 MR. ELSENHEIMER: If we can have a moment,
16 Your Honor. We need to put the images together and
17 then share.

18 While I'm waiting for that, I had
19 referenced Exhibit B. That was the model that you
20 put together.

21 I would move the admission of Exhibit B as
22 well.

23 THE COURT: Any objection, Mr. Nayback?

24 MR. NAYBACK: No objection, Your Honor.

25 THE COURT: Exhibit B is admitted.

1 BY MR. ELSENHEIMER:

2 Q. So -- we're going to have to do these
3 separately, Ms. Libertore.

4 So the image I was just showing you, the
5 aerial view, there was another building there that is
6 not in the model.

7 Is that correct?

8 A. Correct.

9 Q. And then there is a large section of the
10 driveway that is also not in the model.

11 Is that correct?

12 A. Correct.

13 Q. And how much -- did you do any measurements of
14 that particular driveway to ascertain how much of
15 that driveway -- or how far it is between the
16 building and the road that is not in the model?

17 A. So the data that I received only extended to
18 the area that you're seeing. So I couldn't create
19 anything beyond that, simply because it was outside
20 the scope of our collection.

21 Q. I see. So the team that went here to collect
22 data never collected data from the front of the
23 building.

24 Is that correct?

25 A. As far as I'm aware.

1 Q. Okay. And by "the front of the building," I
2 mean the driveway and the view of the building from
3 the road.

4 That data was never collected?

5 A. As far as I'm aware.

6 Q. And let me -- so this is, I believe, Exhibit B.

7 Let me move to Exhibit C.

8 So, Ms. Libertore, this is another image of
9 the model. It's -- let me just -- tell me if I'm
10 wrong.

11 This is a view of the model from what would
12 be the driveway in real life, correct?

13 A. Correct.

14 Q. And on the -- on the left of the screen is
15 another building.

16 Can you describe that building for us, or
17 what is your understanding of what that building is?

18 A. I believe it to be some sort of an apartment
19 complex.

20 Q. I'm sorry. What was that?

21 A. Is it part of an apartment complex, I believe?

22 Q. Is this the entire -- a representation of the
23 entire building?

24 A. No.

25 Q. So it's -- it's only a section of that

1 building?

2 A. Correct.

3 Q. How much of the building is not included in the
4 model?

5 A. I don't have those measurements.

6 Q. Were you ever given those measurements?

7 A. No, sir.

8 MR. ELSENHEIMER: I would move the
9 admission, for purposes of this hearing, of
10 Exhibit C.

11 THE COURT: Any objection, Mr. Nayback?

12 MR. NAYBACK: No objection, Your Honor.

13 Thank you.

14 THE COURT: All right. Exhibit C is
15 admitted.

16 MR. ELSENHEIMER: Let me move -- move back
17 to Exhibit E.

18 BY MR. ELSENHEIMER:

19 Q. So here is Exhibit E. Again, I just want to
20 ask you: The entire front portion of the building,
21 which is basically in the middle of the screen, that
22 is not included in your model, correct?

23 A. Correct. It is not included.

24 Q. And the entire -- the entire driveway section
25 of this building is not included in your model,

1 correct?

2 A. Correct. That would have made the scale too
3 small.

4 Q. And a portion of the apartment complex that is
5 on the left of the image on the screen, a portion of
6 that -- and you don't know what portion -- is also
7 not included in your model, correct?

8 A. Correct.

9 MR. ELSENHEIMER: I would move the
10 admission of Defendant's Exhibit E.

11 MR. NAYBACK: No objection.

12 THE COURT: All right. Exhibit E is
13 admitted.

14 BY MR. ELSENHEIMER:

15 Q. Just to ask you about your model.

16 There's no real way to tell how far -- in
17 the model, there's no way to tell how far the house
18 is to the street.

19 So the house that's included in your model,
20 there is no way to determine, from the model, how far
21 that house is from where the street would be.

22 Is that correct?

23 A. Correct.

24 Q. And there is no way to determine how much
25 farther the apartment building on the left extends,

1 based on your model, correct?

2 A. Correct.

3 Q. Did you -- you said that this model was an
4 accurate reflection of the crime scene. I think that
5 is what you said during your direct examination.

6 Is that right?

7 A. Yes.

8 Q. But you never looked at any images or pictures
9 taken at or around the time of the alleged incident.

10 Is that correct?

11 A. I did receive some images that were taken. And
12 I believe it was around the time of the crime scene.
13 But again, I would have to go into the office and get
14 the time stamp for you.

15 Q. Okay. So there are -- there were photographs
16 that you looked at that were around the time of the
17 alleged incident?

18 A. I would have to look at those time stamps.

19 Q. Okay. So let me ask you about the -- the --
20 some more details of the model.

21 I'm going to bring up Defendant's
22 Exhibit G.

23 Are you able to see Defendant's Exhibit G
24 here?

25 A. Yes, sir.

1 Q. And can you just orient us to where this is as
2 it pertains to your model?

3 A. Yes. So we're standing right in front of the
4 small carport with the tin roof shed. And you are
5 looking towards the front door of the defendant's
6 house.

7 Q. And this particular image is missing several
8 items from what one would see if one were to look at
9 a picture, an actual picture of this scene, correct?

10 A. Correct.

11 Q. Let me pull up Defendant's Exhibit H.

12 So -- so let me ask you first, before I ask
13 you about the image. Let me ask you: This does have
14 a time stamp of 5-5-2018.

15 Have you viewed this image before?

16 A. No, sir.

17 Q. So this is not one of the images that you
18 viewed, that were given to you by the -- by the FBI
19 or anybody else?

20 A. No, sir.

21 Q. Were you given any images with a time stamp of
22 5-5-2018?

23 A. I'd have to look.

24 Q. Well, can you -- can you tell us what this
25 image is?

1 A. Yes. It is from a fairly similar perspective
2 to the exhibit we just had pulled up. And we are
3 looking towards the defendant's front door again.

4 Q. Okay. And this is what your model was trying
5 to reflect.

6 Is that right?

7 A. Correct.

8 Q. And not included in your model, though, are a
9 number of objects that we see in this image.

10 Is that right?

11 A. Right.

12 Q. So for example, there are marble kind of stone
13 blocks to the right of this picture on the screen.
14 They're white in color.

15 Do you see those?

16 A. Yes.

17 Q. They are not included in your model, right?

18 A. Right.

19 Q. And there are -- there are other trees that are
20 in this image, on the picture, that are not included
21 in your model, correct?

22 A. There are some smaller trees, correct.

23 Q. And those trees are not in the model?

24 A. Correct.

25 Q. And if we look -- looking toward the house. If

1 we're looking toward the house, there are a number of
2 objects that are in that inside courtyard that are
3 not included in your model, right?

4 A. Correct.

5 Q. Okay.

6 MR. ELSENHEIMER: I would move
7 Defendant's Exhibit H for purposes of this hearing?

8 MR. NAYBACK: No objection.

9 THE COURT: Exhibit H is admitted.

10 BY MR. ELSENHEIMER:

11 Q. Let me move on to -- let me move on to
12 Defendant's Exhibit I.

13 Actually, I'm sorry. Let me go back to
14 Exhibit G -- I'm sorry. Defendant's Exhibit H.

15 So, Ms. Libertore, I'm not sure you can see
16 this. But toward the center of this picture, of this
17 photograph, there are -- there's a -- there's kind of
18 a big dolly that is -- do you see that? It's just
19 past the --

20 A. Uh-huh.

21 Q. -- the fence, on the inside of the courtyard?

22 A. Yes.

23 Q. That's not included in your model either, is
24 it?

25 A. No, it is not.

1 Q. Okay. So -- and let me go to Defendant's
2 Exhibit I.

3 Do you recognize this?

4 A. Yes.

5 Q. And what is it?

6 A. It is the front door of the defendant's house.

7 Q. And -- okay. And there's a step down from the
8 front door.

9 Is that right?

10 A. Right.

11 Q. There are a number of objects in this
12 particular image that are not included in your model,
13 right?

14 A. Correct.

15 Q. I don't want to go through an exhaustive list
16 of those exhibits. But I think, by process of
17 elimination, what is actually -- the only thing
18 included in your model is just the step, correct?
19 It's the first step, and then a small second step,
20 and then a third step.

21 Is that right?

22 A. Three steps, and the structures themselves.

23 Q. Okay. And that's the step that's coming out of
24 that front door, correct?

25 A. Correct.

1 Q. Okay. So let me just go back very quickly to
2 Exhibit G, and see if we have a -- if there is a good
3 image.

4 I want to ask you about the step that comes
5 out of the door.

6 Personally, I think it would be easier, but
7 I'm going to ask, to see if you -- if you have a good
8 enough view of this picture from the model.

9 But do you see where the top of that blue
10 step is?

11 A. Uh-huh.

12 Q. And then where the bottom of the door is, do
13 you see that?

14 A. Yes.

15 Q. And there's a space between there, correct?

16 A. Correct.

17 Q. How did you ascertain how far that space is
18 from the bottom of the door to the top of the step?

19 A. The steps were created using total station
20 data, which can meet the elevation.

21 Q. So it looks like there's -- there's -- I don't
22 know how many, what the scale would be. But it looks
23 like there's some, relatively speaking, sizable space
24 between the bottom of the door and the top of the
25 step, right?

1 A. It's difficult to ascertain, simply because I
2 can't see where the seam of the door is from this
3 particular photograph.

4 Q. Well, you can see the bottom of the dark
5 portion, correct --

6 A. The window.

7 Q. -- on the door?

8 A. Yes, sir.

9 Q. And that's the bottom of the door?

10 A. I believe there's a little space between that
11 and the actual bottom of the door.

12 Q. Well, I'm not seeing it on this particular
13 picture.

14 But let me go -- let me move to the next
15 exhibit, and actually one beyond that, Exhibit I.

16 So you see there is the bottom of the door,
17 correct?

18 A. Right.

19 Q. And then that screen section, that's a smaller
20 space than what's reflected in the model, isn't it?

21 A. It's difficult to tell from the picture.

22 Q. The other thing that's not included in the
23 model.

24 Do you see where the step is? On both the
25 right side of the step is an extension of that little

1 porch, and on the left side of the step is an
2 extension of the porch that goes toward the left of
3 the screen, as we're looking at it, into the house.

4 Do you see that?

5 A. I see a shelf of some sort.

6 Q. Correct. And then on the other side of the
7 step, going toward the right side of the screen, is
8 another extension of the porch.

9 Do you see that?

10 A. I see a blanket draped over something.

11 Q. Okay. And neither of those extensions, whether
12 it's a shelf or an extension of the porch, neither of
13 those are included in the model, correct?

14 A. The total station data didn't collect that, no.

15 Q. So this total station data doesn't take
16 pictures of everything?

17 A. No. The total station data, it is survey type
18 data, so it only chooses specific points and you go
19 from there.

20 Q. So it never took pictures of this section of
21 the house?

22 A. No. It took measurements of the front steps.

23 Q. And that's it?

24 A. And the house -- I'll have to look at the data,
25 if you'd like a better understanding of exactly what

1 the total station data collected.

2 But in terms of the front porch, it only
3 collected the steps.

4 Q. And you don't have that data with you right
5 now?

6 A. No.

7 Q. Let me ask you this. Is this the first -- the
8 model we looked at, that the government showed you, I
9 think it's Government's Exhibit 1, is that the first
10 version of the model?

11 A. No, sir.

12 Q. There was a model -- there was a version before
13 that, correct?

14 A. Correct.

15 Q. In that version of the model this particular
16 step was different, wasn't it?

17 A. No, I believe it was the same.

18 Q. I'm sorry. Let me reask the question.

19 The step in Version 1 of the model was in a
20 different place as it relates to the house?

21 A. I'm not sure.

22 Q. Did you look -- Okay. Let me ask you this.

23 From Version 1 to Version 2, what changes
24 were made?

25 A. I would say I built up about 90 percent of

1 this, and only 10 percent of the original model
2 remained.

3 Q. What do you mean? I don't quite understand.
4 What do you mean by that?

5 A. So I had to create my own model, because I
6 would be testifying to it, and I needed to testify to
7 my own work.

8 So I took the original model, and I made
9 whatever changes needed to be made, so that I could
10 fairly say that was an accurate representation of the
11 scene.

12 Q. Who designed the first model?

13 A. Another individual information specialist who
14 has since retired.

15 Q. So you did not design the first model?

16 A. No, sir.

17 Q. Let me -- let me show you exhibit --
18 Defendant's Exhibit J.

19 So again, this is a better image with
20 the -- the dolly that I was speaking about earlier,
21 the dolly with a trash can. It's toward -- just to
22 the right of center in the image.

23 Do you see that?

24 A. I do.

25 Q. And that -- that's not included in the model,

1 correct?

2 A. Correct.

3 Q. And again, just for purposes of the hearing
4 today, can you just tell us what we're looking at
5 with this picture?

6 A. Yes. We're still looking at the front door of
7 the defendant's house.

8 Q. Okay. And moving toward the bottom right of
9 the image, there is a fence. And against that fence
10 there are a number of objects that are leaning.

11 Do you see those? There's a red broom
12 handle and some sticks?

13 A. Yes, I see those.

14 Q. Those are not included in your model, correct?

15 A. Correct.

16 Q. Let me ask you about the fencing that you used
17 in your model.

18 How did you ascertain the dimension and the
19 size of the fence for the model?

20 A. I took measurements from the scan data and
21 scaled those down. And I structured a fence that was
22 to 5/16 scale.

23 Q. And that -- you mean in terms of the height of
24 that fence?

25 A. The height of the fence, the space between the

1 wires and the gate, and the diameter of the posts.

2 Q. You mean the wires on the fence in the model?

3 A. Yes, sir.

4 Q. Okay. This wire here is a -- do you know what
5 kind of wire -- what kind of fencing it's called? Do
6 you know what that fencing is, how it's described?

7 A. I'm not sure.

8 Q. Just to -- I want to make sure I -- I think I
9 asked you this.

10 But those -- like the red broom handle and
11 the sticks, all of those objects are not included in
12 the model, right?

13 A. Those are not included.

14 Q. And do you see towards -- against the wall of
15 the house and to the right of the front door, there
16 is a -- some shrubbery.

17 Do you see that green shrubbery?

18 A. I do.

19 Q. That's not included in the model either,
20 correct?

21 A. Correct.

22 Q. Let me ask you this.

23 The FARO -- the scanner. Is it called a
24 FARO scan?

25 A. Yes, FARO scanner.

1 Q. What does FARO stand for?

2 A. FARO is the name of the company that creates
3 the scanner.

4 Q. I see. And that gives -- it gives you
5 measurements between two points. So if I wanted to
6 find a distance between Point A and B, I could look
7 at the FARO scanner, and that would give me an
8 accurate distance between the two, correct?

9 A. Correct.

10 Q. Does the FARO scan also give you elevation or
11 differences?

12 A. I'm sorry. Could you repeat the question?

13 Q. Does it give you elevation or altitude
14 differences between two points?

15 A. Yes.

16 Q. Okay. So for example, if you were taking a
17 FARO scan of something that's on a piece of land and
18 there's a light grade or a slope between Point A and
19 Point B, the FARO scan would reflect that, correct?

20 A. Correct.

21 Q. Was -- does your model reflect any difference
22 in grade or slope between any different points on
23 this particular -- at 825 Riverside?

24 A. It doesn't have topographical data, but it does
25 reflect the difference in elevation of structures,

1 outhouses, and things like that.

2 Q. But the topographical data, it's all on the
3 same level, correct?

4 A. Correct.

5 Q. So if there was a topographical difference
6 between the porch and, let's say the other side of
7 the model where the metal shed is, if there was a
8 topographical difference, the model would not reflect
9 that topographical difference?

10 A. It should reflect it simply because it's all
11 built off of the same data.

12 So you start at a central location and you
13 build your model out from that. So if you have a
14 shed that's, you know, 6 feet higher than something
15 in real life, it's going to be reflected in the
16 model.

17 Q. But if the model is flat, how is that -- how is
18 that the case?

19 A. So we are just taking the data from the scanner
20 and the total station and using that to recreate an
21 accurate representation of how the scene appeared.

22 And the -- from that measurement, I was
23 able to ascertain the -- according to the data, when
24 I compared the elevation of, say, the steps to the
25 shed, it should be accurate.

1 Q. But if there's a grade between the steps and
2 the shed and the model itself, the bottom of the
3 model is flat, it wouldn't reflect the grade, would
4 it?

5 A. If it had been more extreme it would. But this
6 was all fairly flat.

7 Q. You say "fairly flat." But it's not flat.
8 There is a little bit of a difference in grade
9 between the --

10 A. Yeah.

11 Q. And your model doesn't reflect that. That's my
12 question.

13 A. Correct.

14 Q. Thank you. Let me move on --

15 Oh, let me move for introduction of
16 Defendant's Exhibit J.

17 THE COURT: Any objection to J?

18 MR. NAYBACK: No, Your Honor.

19 THE COURT: All right. Exhibit J is
20 admitted.

21 BY MR. ELSENHEIMER:

22 Q. Let me move to Exhibit K.

23 I don't have too many questions about this.
24 But this is -- why don't you just describe what the
25 particular perspective this image gives you of your

1 model.

2 A. Okay. So this is us looking over the fence in
3 the courtyard of the defendant's property. We're
4 looking towards the shed and the apartment building
5 across the driveway.

6 Q. Do you recall, from your view of the FARO scan,
7 to the data you received from the data team, the
8 scans, this is not an area that is clear of debris
9 and objects, is it?

10 A. It is not.

11 Q. There are a lot -- there are a number of
12 objects that, on the FARO scan, are not included in
13 this particular scene?

14 A. There were a number of objects and debris that
15 were not depicted here.

16 Q. Okay. It's safe to say that one, in real life,
17 wouldn't be able to look through this particular
18 fence here, as -- as we are right now.

19 It's kind of covered with things, isn't it?

20 A. It had some debris stacked up against it.

21 Q. Okay. Thank you.

22 Let me move on to -- oh, I'll move
23 Defendant's Exhibit K.

24 THE COURT: Mr. Nayback, any objection?

25 MR. NAYBACK: No objection, Your Honor.

1 Thank you.

2 THE COURT: K is admitted.

3 BY MR. ELSENHEIMER:

4 Q. Let me move to -- I want to ask you about this
5 particular perspective. This is Defendant's
6 Exhibit L.

7 Tell me about -- if I am right, in terms of
8 perspective. This is a view of the inner courtyard
9 from the -- from the driveway.

10 Is that correct, the driveway?

11 A. Correct.

12 Q. Okay. And there's a -- a tree to the right,
13 next to the house.

14 Is that right?

15 A. Right.

16 Q. And you said these trees are to scale.

17 A. They are placed in the model to scale.

18 Q. Okay. They are placed to scale, which is to
19 say that where they are kind of glued to the -- to
20 the model, or to the board of the model, that's to
21 scale, right?

22 A. Correct.

23 Q. Okay. But the size of the trees, the width or
24 the narrowness of the trees, that's not necessarily
25 to model -- or to scale?

1 A. It's difficult to quantify trees, simply
2 because foliage changes. So they are there as
3 placeholders.

4 Q. Now this particular area here, this is -- and
5 by "this," the inner courtyard -- is surrounded by a
6 fence, correct?

7 A. Correct.

8 Q. And we can see the fence. It's the metal fence
9 here?

10 A. Yes.

11 Q. Let me show you Defendant's Exhibit M.

12 Do you see this image? Can you -- can you
13 describe what this image is?

14 A. Yes. This is us looking towards the courtyard
15 from the driveway.

16 Q. Okay. And the tree that's kind of just right
17 of center, that would be the tree that your model has
18 right next to the house, right?

19 A. Correct.

20 Q. But it's a much larger tree that we see here,
21 correct, than -- than what seems to be a scale tree
22 in your model?

23 A. Oh. But it's --

24 Q. It's a bigger tree vertically.

25 Is that right?

1 A. Correct.

2 Q. And it's a slightly larger tree, or a larger
3 tree horizontally. Like the canopy of the tree is
4 larger than what it is in your model?

5 A. That's difficult data to capture. So yes.

6 Q. And to the -- just to the left of that tree on
7 our screen, there is a taller tree and then what
8 appears to be a shorter tree?

9 A. Correct.

10 Q. And again, is that shorter tree in your
11 model -- and I can go back to the prior image, if you
12 would like me to.

13 A. If you could, that would be great.

14 Q. This?

15 A. Yes, it is.

16 Q. The shorter tree, where is it in your model?

17 A. It's, I believe, part of the shrubbery just to
18 the left of that shed area, where everything is
19 condensed.

20 Q. So -- so by the "shed area," you're talking
21 about the white shed with the black roof that's
22 inside the courtyard?

23 A. Yes, sir.

24 Q. Okay. So you're saying it's to the left of
25 that?

1 A. The taller tree is the one directly to the left
2 of that.

3 Q. Okay. Is that the tree you're saying is the --
4 that green shrub?

5 A. The taller one.

6 Q. Okay. So let me go back. Let's -- I want to
7 ask you about that taller tree.

8 Let's go back and see Defendant's
9 Exhibit M.

10 We can see the taller tree, correct?

11 A. Uh-huh.

12 Q. It's -- and then right next to that taller
13 tree, kind of toward the -- the -- toward the front
14 of the image, is a -- is a shorter tree that has a
15 wider canopy.

16 That tree is not in your model, is it?

17 A. There are three trees in a line in that
18 specific area that have fairly sizable trunks. And I
19 measured and placed those according to the scale of
20 the model.

21 It's difficult, from this picture, to tell
22 exactly which tree belongs to which trunk, simply
23 because of the foliage. So I don't want to say
24 something that is in the model or isn't, and
25 vice versa.

1 Q. Okay. So that tree -- the canopy of that green
2 tree, maybe the trunk is to scale in the model, but
3 that canopy is not reflected in the model, is it? We
4 can go back to the model if you want.

5 A. Okay.

6 Q. I want to ask you about that canopy.

7 That canopy is not in that model?

8 A. In the data that I received, there was another
9 tree, which is the tree that you see to the left,
10 between the fence and the camper.

11 If we're talking about the same tree, then
12 yes, it is in the model.

13 Q. But the canopy isn't -- doesn't reflect the
14 size of that canopy.

15 A. The canopy -- we could say that it's not
16 perfectly reflective.

17 Q. Okay. Thank you.

18 Let me move to Exhibit N.

19 Before I do so, I would move
20 Defendant's Exhibit L, if I haven't done so, and
21 Exhibit M, if I have not done so.

22 THE COURT: Any objection to L and M,
23 Mr. Nayback?

24 MR. NAYBACK: None, Your Honor. No
25 objection.

1 THE COURT: All right. L and M are
2 admitted.

3 MR. ELSENHEIMER: Your Honor, I believe I
4 may have failed to also move Exhibit K. If I've
5 failed to do so, I do so now. It was the image of
6 the fence that we were looking at three images ago.

7 THE COURT: I think K was admitted.

8 MR. ELSENHEIMER: Okay. Thank you.

9 BY MR. ELSENHEIMER:

10 Q. So let me move to N.

11 So, Ms. Libertore, can you just describe
12 what we are looking at here?

13 A. That is a similar view looking into the
14 courtyard from the driveway.

15 Q. And this image -- let me just ask you about it.

16 There are a number of trees and shrubs and
17 bushes. There's a lot of foliage that blocks one's
18 view of both the fence and the inner courtyard, and
19 to some extent, that shed with the white side and the
20 grayish roof, correct?

21 A. Correct.

22 Q. And it makes it difficult, if not impossible,
23 to see inside the courtyard?

24 A. There's a lot of foliage.

25 Q. And that amount of foliage that we see in this

1 particular image is not reflected in your model as it
2 is in this image, is it?

3 A. It -- it is reflected, for the most part.

4 Q. So let me go to Exhibit L again.

5 You're saying that where we can see the
6 fence on the right side -- so if we go to the side of
7 the house where the fence connects to the house, do
8 you see where I am talking about, to the -- just
9 right of center of the picture?

10 A. Yes.

11 Q. And there's -- I don't know what the distance
12 would be, but several feet, that we can see of that
13 fence that's unobstructed by any type of foliage.

14 Do you see that?

15 A. It -- it is less than several feet. But yes, I
16 can see it.

17 Q. Okay. It's a couple feet?

18 So that -- let's go back to Exhibit N.

19 And where, in exhibit -- well, this is
20 Exhibit N. Let's go to Exhibit N.

21 Where -- and there's no -- all of that side
22 of the house, where the fence connects to the house,
23 that's covered with foliage in this image, isn't it?

24 A. It is in this image. But in the data that I
25 was given, it wasn't.

1 Q. But in this image, it is?

2 A. Correct.

3 Q. Okay. Let me go back to Exhibit L.

4 Let me ask you about -- so just to orient
5 us, let's use, as a point of reference, the shed
6 that's in the -- in that little courtyard.

7 Just to the left and down from that is the
8 top of the fence, right? And the top of the fence,
9 and then a little bit of the fence under there, maybe
10 a foot, half a foot. I'm not sure how much it is to
11 scale.

12 But there is a section of the fence that we
13 can see, correct?

14 A. Correct.

15 Q. And then moving above the fence, there is a
16 section of that tree that we can see. The trunk,
17 where we can see the trunk. Not necessarily the
18 foliage or the canopy, but we can see that trunk,
19 correct?

20 A. Correct.

21 Q. And how many -- I mean, I'm guessing it is
22 probably 3 feet. If we were to take a scale image of
23 that, it's about 3 feet of that tree that's not
24 covered by foliage going up from the fence, right?

25 A. I would have to measure it.

1 Q. Roughly 2, 3 feet?

2 A. I would have to measure it.

3 Q. Okay. But a good -- a good part of that tree,
4 from the bottom of it, is not covered by foliage in
5 this model?

6 A. Correct.

7 Q. Okay. Let's go back to Exhibit N.

8 And so looking at this picture, where, in
9 this picture, is the top of that fence, and where is
10 anything that shows just the trunk of that tree?

11 A. The lighting in this image makes it difficult
12 to see.

13 Q. But you can see that there's a lot of foliage
14 in and around the fence, above the fence, and going
15 up that tree, correct?

16 A. Correct.

17 Q. And let me go back to Exhibit M, because I
18 think maybe you can see it in there as well.

19 You can see from here there's a lot of that
20 foliage of that tree that the canopy of which comes
21 out. So just -- I'm sorry. I know this is tough
22 when we're not in person.

23 But just to orient you to that, I'm talking
24 about the tree that its canopy kind of stretches to
25 the left of the tree and gets -- do you see that?

1 A. Yes.

2 Q. And again, that's not in the model.

3 And this particular image is covered with
4 foliage and greenery -- green, kind of leaves and
5 shrubs.

6 And that's not reflected in your model, is
7 it?

8 A. Correct.

9 Q. Okay.

10 MR. ELSENHEIMER: May I have just a moment,
11 Your Honor?

12 THE COURT: Yes.

13 MR. ELSENHEIMER: Before I forget,
14 Your Honor, I would like to move Defendant's
15 Exhibit N. I don't think I have done so yet.

16 THE COURT: Is there objection to N,
17 Mr. Nayback?

18 MR. NAYBACK: No objection, Your Honor.

19 THE COURT: N is admitted.

20 BY MR. ELSENHEIMER:

21 Q. Let me move on to -- I want to ask you about
22 the view of the back portion of the model,
23 Ms. Libertore, and I will move to
24 Defendant's Exhibit P.

25 MR. ELSENHEIMER: I'm sorry, Your Honor.

1 If I could have just a moment to bring up Exhibit P.

2 BY MR. ELSENHEIMER:

3 Q. Are you able to see that, Ms. Libertore?

4 A. Yes, I am.

5 Q. Okay. So what -- just directionally speaking,
6 if the kind of top right of the screen is the north
7 end, this here is the south end, or south?

8 A. We are looking directly to the north from the
9 south.

10 Q. Okay. This is directly south to north.

11 Let me ask you about -- that is -- well,
12 let's orient ourselves.

13 There's a pole in the middle.

14 Do you see that?

15 A. Yes.

16 Q. That's a telephone pole, correct?

17 A. Correct.

18 Q. Okay. Just to the -- like left and look down
19 from that moving south, there's a fence. It's kind
20 of like a wooden fence.

21 Do you see that?

22 A. Yes.

23 Q. Okay. There's a woodpile in front of that
24 fence, kind of to the north of that fence right
25 directly next to it.

1 A. Right.

2 Q. Do you remember looking at that in your -- from
3 the data you collected, or that they collected for
4 you?

5 A. Yes. Uh-huh.

6 Q. And that woodpile is not included in the model,
7 is it?

8 A. It is not.

9 MR. ELSENHEIMER: I will move
10 Defendant's Exhibit P.

11 MR. NAYBACK: No objection.

12 THE COURT: Any objection?

13 MR. NAYBACK: No objection, Your Honor.

14 THE COURT: Exhibit P is admitted.

15 MR. ELSENHEIMER: Thank you.

16 BY MR. ELSENHEIMER:

17 Q. Let me bring up Exhibit Q.

18 So what -- can you just describe this,
19 Ms. Libertore? Where is this from?

20 A. We are looking from the driveway to the shed
21 and the fence, which is in the western direction.

22 Q. Now, let me move on to Exhibit R.

23 Do you recognize this image?

24 A. Yes.

25 Q. And what is it a view of?

1 A. We are looking from the driveway, in a slightly
2 Northwestern direction, towards the house.

3 And you can see the telephone pole as well.

4 Q. Okay. So there's the telephone pole. And that
5 is the telephone pole that's in your model.

6 Is that right?

7 A. Correct.

8 Q. And there are kind of a number of things. I'm
9 not sure that you can see them. Let me know if you
10 can't see them.

11 But there is a small kind of break, almost,
12 just left of center of the picture. There's a wooden
13 kind of like a bucket or a planter of sorts.

14 Do you see that?

15 A. I do.

16 Q. And there are a couple of logs that are laying
17 on the ground next to that.

18 A. Yes.

19 Q. Do you see those?

20 A. Yes.

21 Q. And those are not in your model, are they?

22 A. They are not.

23 Q. Let me ask you this.

24 There's a -- to the right of this
25 particular image there is a large shrub.

1 Do you see that large shrub?

2 A. Yes.

3 Q. And that's not in your model, is it?

4 A. That is outside the scope of the model.

5 Q. So no.

6 Ms. Libertore, we are going to try to zoom
7 in on that a little bit. I want to ask you about
8 another tree towards the back of the property.

9 So just behind, or kind of on the western
10 side of that telephone pole, there's another tree,
11 right?

12 A. Yes.

13 Q. And that's a tree with a wide canopy?

14 A. Correct.

15 Q. Let me go back to Exhibit Q.

16 That tree, with the very wide canopy that
17 we just looked at, is the tree that is just behind,
18 to the west, of the pole that is in your model,
19 correct?

20 A. It is.

21 Q. And I think it's safe to say that that canopy
22 is not close to what it is in real life in your model
23 is it?

24 A. Correct. It's just a representation.

25 Q. It's just a representation. But that is a much

1 wider canopy in real life?

2 A. Correct.

3 MR. ELSENHEIMER: I move in Defendant's
4 Exhibits P, Q and R.

5 THE COURT: P is already in.

6 Q and R, any objection?

7 MR. NAYBACK: No, Your Honor. Thank you.

8 THE COURT: All right. Q and R are
9 admitted.

10 BY MR. ELSENHEIMER:

11 Q. When you receive -- so we talked about the
12 first version of the model and the second version of
13 the model.

14 When you received the second version -- I'm
15 sorry. When you received the first version of the
16 model you said you made changes to it, right?

17 A. Yes.

18 Q. And did you consult with anybody about what
19 changes should be made to that model?

20 A. I did.

21 Q. Did anybody tell you particular changes that
22 should be made to the model?

23 A. No. I made those decisions, but I ran it by my
24 supervisor, who agreed.

25 Q. What were the changes? Would you be able to

1 describe them for us?

2 A. So it's difficult to quantify exactly what
3 those changes were, simply because this is mostly a
4 model built from the ground up by myself. So it was
5 a model that was built pretty much originally from
6 square one, from the data that I received.

7 Q. So what happened to Version 1? Is that --

8 A. It's no longer a model.

9 Q. Okay.

10 MR. ELSENHEIMER: May I have just a moment,
11 Your Honor?

12 THE COURT: Yes.

13 BY MR. ELSENHEIMER:

14 Q. So in terms of -- you were asked to construct a
15 model of a particular alleged crime scene.

16 Is that right?

17 A. Correct.

18 Q. Did you take into account the difference in
19 seasons between when the data was collected and when
20 the alleged incident took place?

21 A. I did.

22 Q. When and how did you take that into account?

23 A. I knew that a considerable amount of time had
24 passed between when the incident took place and when
25 the data that I received had been collected, which is

1 why you only see a small amount of foliage, and the
2 big trees placed where they should be, simply because
3 I had no way of knowing exactly what leaves were
4 placed where and what debris was placed where, or how
5 much wood was in that fire pit.

6 So I just took everything that I knew was
7 in the structure and large landscaping, and placed it
8 according to the data.

9 Q. How did you ascertain the type of foliage from
10 the time of the alleged incident?

11 A. So where I had pictures from the time of the
12 incident, I placed those trees.

13 And of course if you have a tree that's
14 30 years old or something like that, with the trunk
15 that's a sizable diameter, that has been there for a
16 few years, so I placed that.

17 Q. So just to go to exhibit -- Defendant's
18 Exhibit N.

19 So this is an image taken on -- you see the
20 time stamp -- or the date stamp at the bottom of the
21 image, correct? It was taken on 5-5-2018.

22 A. Yes, sir.

23 Q. The day of -- I mean, short- -- shortly after,
24 almost within hours after the alleged incident. Did
25 you review this particular image in constructing your

1 model?

2 A. I did not.

3 Q. And as we have discussed, there's -- there are
4 leaves and foliage in this image that is not
5 reflected in your model, correct?

6 A. Correct.

7 Q. And so the model isn't based on images drawn
8 from the scene of the alleged crime?

9 A. They are drawn from the scene of this incident.

10 Q. Taken a year later, right?

11 A. The measurements were.

12 Q. The measurements were taken a year later. And
13 the FARO scans were taken, actually, over a year
14 later, correct?

15 A. I don't know the exact date, but I know some
16 time had elapsed.

17 Q. It was a considerable amount of time that had
18 elapsed?

19 A. Correct.

20 Q. You just said that.

21 And all of the pictures that I've shown you
22 of the -- of the scene, except for the aerial photos,
23 but these photos that have 5-5-2018, let me ask you.

24 You never looked at or consulted any of
25 those particular images?

1 A. None of the ones that you've shown me.

2 MR. NAYBACK: Objection --

3 THE COURT: I'm sorry. I couldn't hear
4 you, Mr. Nayback.

5 MR. NAYBACK: I'm sorry. I was talking
6 over the witness.

7 But the objection was that it has been
8 asked and answered.

9 MR. ELSENHEIMER: I'll move on.

10 THE COURT: Thank you.

11 BY MR. ELSENHEIMER:

12 Q. Does your model take into account the time of
13 day that the alleged incident took place? So that it
14 took place in the middle of the night under darkness.

15 Did your model take that into account?

16 A. Measurements don't change from time of day to
17 time of day.

18 Q. Do you know when the first model was peer
19 reviewed, that first model that you were talking
20 about?

21 A. No. I --

22 MR. NAYBACK: Objection; relevance,
23 Your Honor.

24 THE COURT: You'll have to tell me why this
25 is relevant, Mr. Elsenheimer.

1 MR. ELSENHEIMER: I'm just -- I'm wondering
2 about the differences between Version 1 of the model
3 and Version 2 of the model, and why there was
4 significant changes made to Version 2.

5 THE COURT: Well, I think she's already
6 talked to some of that, but I don't see that it's
7 particularly useful for today's hearing. So...

8 MR. ELSENHEIMER: I'll move on.

9 THE COURT: Thank you.

10 BY MR. ELSENHEIMER:

11 Q. You discussed the training that you've had.

12 How long have you worked for the FBI?

13 A. Two years and a month.

14 Q. And how many crime scenes have you done,
15 collected data on, and reproduced a model for?

16 A. Close to 20 scenes for data collection.

17 And product design, I've done eight
18 physical models and nine digital 3D models.

19 Q. You said you've been with the FBI for over
20 two years.

21 A. Yes, sir.

22 Q. Have you always been a visual information
23 specialist?

24 A. I have.

25 Q. We've discussed a lot of particular features of

1 the property -- objects, shrubs, trees -- that are
2 not included in the model.

3 My question is: How did you determine what
4 to include in the model and what to leave out of the
5 model?

6 A. Everything that is a removable structure or a
7 vehicle, I included. And if there were large trees,
8 I included those as well.

9 If I had pictures from the time of the
10 incident, I included the main foliage that I was able
11 to see. But anything that was small and removable, I
12 can't testify to the fact that that was there at the
13 time of the incident, so I didn't include it.

14 Q. It is safe to say that the quality of a
15 particular model is dependent on the quality of the
16 scan data.

17 Is that correct?

18 A. The accuracy of it.

19 Q. It's dependent on the quality or the accuracy
20 of the scan data.

21 Is that right?

22 A. All types of data collection. So whether it's
23 the scan data, the total station data, the
24 photography, it's accurate to say.

25 Q. Do you have any certifications or licenses?

1 A. I do in FARO scanning.

2 Q. You have a license or a certification in FARO
3 scanning?

4 A. I do. And I have a certification in AutoCAD,
5 which is the program we use for measuring total
6 station data. And we can use it for scan data as
7 well.

8 MR. ELSENHEIMER: Nothing further,
9 Your Honor.

10 I'll pass the witness.

11 THE COURT: Do you have anything further,
12 Mr. Nayback?

13 MR. NAYBACK: I do not, Your Honor. Thank
14 you.

15 THE COURT: May this witness be excused
16 from this hearing?

17 MR. NAYBACK: She may.

18 MR. ELSENHEIMER: Yes, Your Honor.

19 THE COURT: All right.

20 Thank you for your testimony today,
21 Ms. Libertore.

22 THE WITNESS: Thank you, Your Honor.

23 THE COURT: Mr. Nayback, you may call your
24 next witness.

25 MR. NAYBACK: Your Honor, we would be

1 moving for this model.

2 The witness testimony is complete. We'd be
3 happy to offer brief argument, but if the Court
4 doesn't need any, we would be going on to the next
5 witness, which is Theodore Chavez, who did our --
6 which is more of a *Daubert* hearing, I understand.
7 Ms. Libertore was just a foundational witness.

8 So however the Court wants to proceed. I'm
9 happy to make brief argument or to move on to the
10 next witness.

11 THE COURT: Move on, please.

12 MR. NAYBACK: Thank you, Your Honor.

13 Ms. Wilson will be handling that witness.

14 THE COURT: All right.

15 MS. WILSON: The United States calls
16 Theodore Chavez.

17 (*Witness duly sworn.*)

18 THE COURT: So, Mr. Chavez, before we
19 begin, let me just ask you to spell your first and
20 last name for the record, please.

21 THE WITNESS: The first name is spelled
22 T-H-E-O-D-O-R-E. The last name, Chavez, C-H-A-V-E-Z.

23 THE COURT: Thank you.

24 You may proceed, Ms. Wilson.

25 (*Discussion off the record.*)

1 (A recess was taken from 10:22 a.m. to
2 10:27 a.m.)

3 THEODORE CHAVEZ, GOVERNMENT'S WITNESS, SWORN

4 DIRECT EXAMINATION

5 BY MS. WILSON:

6 Q. Okay. Are you ready, Mr. Chavez?

7 A. I am, yes.

8 Q. What do you do for a living, sir?

9 A. I'm employed by the Federal Bureau of
10 Investigation, located in Quantico, Virginia.

11 Q. And what is your formal title?

12 A. I'm a forensic examiner, who is qualified in
13 the discipline of firearms and tool mark discipline.

14 Q. What are your responsibilities in that
15 position?

16 A. My primary responsibilities as an examiner are
17 to receive evidence relating to firearms and tool
18 marks, to include shooting incident reconstruction
19 requests, conducting examination on such items or
20 requests, generating a lab report, and being able to
21 testify to those results in a court of law.

22 Q. And how long have you been employed with the
23 FBI?

24 A. Approximately ten years, since 2009.

25 Q. And, sir, are you familiar with the methods and

1 procedures employed by the FBI relating to firearm
2 trajectory analysis?

3 A. Yes, I am. Those are currently referred to as
4 our laboratory operation manual, our standard
5 operating procedures.

6 I am also a quality assurance manager for
7 those documents.

8 Q. And in addition to the firearm trajectory
9 analysis, what other areas do you work in as a
10 scientist for the FBI?

11 A. I'm qualified in the disciplines of firearms
12 evidence, so that being any type of firearm that is
13 submitted -- bullets, cartridge cases, tool marks --
14 if they are suspect of a burglary or some cut item.

15 Also gunshot residue, distance
16 determination. A victim is shot and there's a
17 question of how close or what was the approximate
18 distance.

19 And then also shooting incident
20 reconstruction, trying to generate information about
21 that shooting based on objects or areas.

22 Q. Thank you. If I may show you what has been
23 marked for identification purposes, for the purposes
24 of this hearing, as Government's Exhibit 1.

25 Let me know if you see that on your screen.

1 Do you see that, sir?

2 A. Yes, I see it.

3 Q. Do you recognize it?

4 A. I do recognize it by my name up on the top and
5 the revision date at the bottom of November 15, 2019.

6 Q. Is it a fair and accurate depiction of your --
7 can you explain what it is for the Court?

8 A. Sure. It's broken up into three parts:
9 professional experience, outlining training, as well
10 as current responsibilities and prior experience with
11 the FBI. Education, as well as testimony experience
12 within the discipline.

13 Q. So that is your CV, sir?

14 A. That is correct.

15 Q. And is this a fair and accurate depiction of
16 your CV?

17 A. That is correct.

18 MS. WILSON: I move Government's Exhibit
19 Number 1.

20 THE COURT: Is there objection,
21 Mr. Elsenheimer?

22 MR. ELSENHEIMER: No objection, Your Honor.

23 THE COURT: All right. Thank you.

24 Exhibit 1 is admitted.

25

1 BY MS. WILSON:

2 Q. You alluded to this section earlier.

3 Could you describe for the Court your
4 educational background?

5 A. Sure. I received a bachelor's of science in
6 physics from St. Vincent College, which is located in
7 Latrobe, Pennsylvania.

8 Q. And how does your physics degree relate to the
9 area of trajectory analysis?

10 A. First, the examiner position for the FBI lab
11 requires a science background. And so my degree in
12 physics allowed me to have the foundational
13 experience that was critical to being, then, able to
14 enter into their examiner training program.

15 Q. And generally, could you describe the
16 specialized training you've received since becoming
17 employed at the FBI that qualifies you for your
18 analysis, your special analysis?

19 A. My training program was approximately
20 three years. So any new examiner will enter into a
21 training program that is basically a training manual
22 outlining various elements. And this can be
23 classroom based, instruction based, as well as
24 on-the-job training.

25 Those elements will cover various aspects

1 of different items that are routinely submitted, to
2 include a lot of the administrative, such as travel,
3 discovery, and also understanding of the operating
4 procedures of the lab.

5 The way that an examiner will be able to
6 pass the program is through a series of competency
7 tests, as well as three moot courts and three oral
8 boards.

9 Upon completion of those tests, as well as
10 all signatures of the training manual, the examiner
11 is then qualified within that discipline.

12 Q. Thank you. And of that -- and this includes
13 your expertise in trajectory analysis, specific just
14 to trajectory analysis?

15 A. I'm sorry. My CV or the training program?

16 Q. The training program.

17 A. Yes. The training program will highlight
18 elements relating to trajectory analysis.

19 Q. How many cases, approximately, have you
20 performed trajectory analysis in?

21 A. I've conducted examinations in approximately
22 30 cases. But I've also technically reviewed a
23 number of cases for other examiners.

24 Q. And have you testified in court as an expert in
25 trajectory analysis?

1 A. I have, yes, one time.

2 Q. And you've also testified as an expert
3 regarding other issues as well.

4 Is that correct?

5 A. That is also correct.

6 Q. Could you describe briefly for the Court what
7 types of courts you were considered to be an expert
8 in?

9 A. Sure. Displayed up on the screen there at the
10 bottom is testimony experience. So approximately 11
11 times, or 11 times I've testified. Seven of those
12 times in federal court and four in state court.

13 MS. WILSON: Your Honor, at this time the
14 United States would offer Mr. Chavez as an expert in
15 the field of firearm trajectory analysis with the
16 ability to testify to opinions and analysis therein.

17 THE COURT: Any objection, Mr. Elsenheimer?

18 MR. ELSENHEIMER: Yes. We object to his
19 testifying as an expert. So that's the purpose of
20 this hearing, as I understand it.

21 THE COURT: Right. That is the purpose of
22 the hearing.

23 So having tendered, then, the expert,
24 Mr. Elsenheimer, would you like to conduct any
25 examination at this time?

1 MR. ELSENHEIMER: I could voir dire him now
2 as an expert. But I could also do so at the end, as
3 part of cross-examination. It's whatever you would
4 like.

5 THE COURT: Well, why don't you voir dire
6 the witness now, please.

7 MR. ELSENHEIMER: Thank you, Your Honor.

8 VOIR DIRE EXAMINATION

9 BY MR. ELSENHEIMER:

10 Q. Good morning, Mr. Chavez.

11 A. Good morning.

12 Q. Did you -- let me just -- I want to be sure I
13 understand what you just testified to.

14 You said you testified as an expert, did
15 you say, 11 times?

16 A. That is correct.

17 Q. And those are the cases listed at the bottom of
18 your resume.

19 Is that right?

20 A. That's right.

21 Q. How many times have you testified as an expert
22 for trajectory analysis?

23 A. One time in federal court.

24 Q. And where was that?

25 A. That was located in Jacksonville, Florida.

1 Q. And so the other times testifying, was that as
2 a fact witness or an expert witness in something
3 other than -- I'm sorry. That was a bad question.

4 Was that as a fact witness?

5 A. No.

6 Q. The other times that you listed, those are as
7 an expert witness, but in something other than
8 trajectory analysis?

9 A. Every time that I've testified has been to an
10 expert witness within the discipline of firearms and
11 tool marks.

12 Q. I see. Thank you.

13 And what was your undergraduate degree in?

14 A. It was in physics, with a major in physics and
15 a minor in mathematics.

16 Q. Do you have any advanced degrees in physics?

17 A. I do not.

18 Q. How long have you worked for the FBI?

19 A. Approximately ten years, since 2009.

20 Q. And have you taken any advanced courses in
21 trajectory analysis?

22 A. I did complete the training program and also
23 served as an instructor for the shooting incident
24 reconstruction course that is -- that is commonly
25 afforded to evidence response team personnel

1 throughout all of our field offices.

2 Q. Did you take any undergraduate courses in
3 trajectory analysis?

4 A. No undergraduate studies, no.

5 Q. Were you ever excluded as a witness in -- as an
6 expert in trajectory analysis?

7 A. No, I have not.

8 Q. Have you ever been involved in peer review of
9 other individuals' work on the topic of trajectory
10 analysis?

11 A. Yes. Within the capacity of a technical, as
12 well as an administrative reviewer.

13 Q. What is a technical reviewer?

14 A. Our quality system, in order for a product to
15 be released, has to first go through a technical
16 review. The technical review is conducted by another
17 qualified examiner within that discipline, so looking
18 at all of the records that are supporting the results
19 that is ultimately issued within the laboratory
20 report.

21 MR. ELSENHEIMER: May I have a moment,
22 Your Honor?

23 THE COURT: Yes.

24 MR. ELSENHEIMER: Your Honor, I have no
25 other questions. We don't object to Mr. Chavez as an

1 expert. Our objection still stands as it pertains to
2 the Daubert factors with regard to the evidence he's
3 testifying about for this case.

4 THE COURT: All right. So, Ms. Wilson, you
5 may proceed.

6 And the Court will recognize Mr. Chavez as
7 an expert in the area of trajectory analysis.

8 MS. WILSON: Thank you, Your Honor.

9 DIRECT EXAMINATION (Continued)

10 BY MS. WILSON:

11 Q. Mr. Chavez, did you prepare, in preparation for
12 today's hearing, a slide presenta- -- a slide to
13 assist with your testimony today?

14 A. Yes, I did.

15 Q. Let me show you what has been marked for
16 identification purposes as Government's Exhibit 2.

17 Sir, do you recognize these? And I'm going
18 to go through, actually, Exhibits 2, 3, and 4. So if
19 you'll let me know when you're done looking at each
20 page.

21 A. Yes.

22 Q. That was Government's Exhibit 2.

23 Do you recognize that, sir?

24 A. Yes, I recognize it.

25 Q. And Government's Exhibit 3 and Government's

1 Exhibit 4.

2 Do you recognize those as well?

3 A. I do recognize all three exhibits.

4 Q. And could you explain to us how so?

5 A. The first 13 pages there at the bottom with
6 pagination, and at the very front first slide,
7 represents the case, as well as my name there and my
8 title and place of employment.

9 Q. And these are fair and accurate depictions of
10 the slide material that you prepared for today's
11 testimony?

12 A. They are.

13 Q. And Exhibits 3 and 4 are merely larger images
14 of the content of Slide 3, providing references?

15 A. For clarity, yes.

16 MS. WILSON: I move Government's
17 Exhibits 2, 3, and 4, Your Honor, with permission to
18 publish freely as the witness requires.

19 THE COURT: Mr. Elsenheimer, is there any
20 objection to 2, 3, and 4, for purposes of the hearing
21 today?

22 MR. ELSENHEIMER: I have no objection.

23 THE COURT: All right. Exhibits --
24 Government's Exhibits 2, 3, and 4 are admitted.

25

1 BY MS. WILSON:

2 Q. Mr. Chavez, could you explain to us, what is
3 firearm trajectory?

4 A. Trajectory analysis, for this slide here, is
5 broken up into five different elements.

6 It's critical to know that when a bullet,
7 or when a projectile takes flight, there will either
8 be several elements that are considered as a result
9 of establishing, first, where it originated, what
10 items may it have hit or encountered. Potentially,
11 if it just took a path to a proximate directionality.
12 And that fifth element there, sometimes the general
13 shape or characteristic of a hole or an impact can be
14 of value, just depending on the characteristics that
15 are surrounding that area.

16 Q. And you --

17 A. And simply put -- I'm sorry.

18 Simply put, in order to create a -- or
19 approximate a path of a projectile, there needs to be
20 two points. Those two points then create a line
21 indicating the path of that bullet.

22 Q. And can you explain what happens when the FBI
23 is asked to perform trajectory analysis?

24 A. Sure. So on this slide, we have a general work
25 flow of the process that takes place. So there on

1 the left-hand side is a process map showing a large
2 picture of when an incident occurs and all of the
3 resources, to include certain elements of the
4 laboratory that will respond to assist that incident.

5 On the right-hand side is a detailed
6 synopsis of all of the elements that can be provided
7 on scene as a result of a shooting investigation.

8 Q. And can you explain how this works, when you --
9 once you get a call, what happens?

10 A. So from the process map we're pulling certain
11 elements that are critical to my unit, which is the
12 firearms and tool marks unit, as well as the
13 operational projects unit.

14 Those two units are two of the four units
15 that serve on the laboratory shooting reconstruction
16 team. So when a shooting occurs there will be a team
17 deployed out. And it generally begins with a
18 conference call of, Okay. What's the area,
19 approximate number of shooters?

20 We start developing a plan, or an op- -- a
21 plan as a mission, or an operational meeting. What
22 type of assets need to be sent out? Should several
23 teams be sent out or just a five-person team?

24 When we talk about scene deployment,
25 that's, Okay. What type of location are we going to?

1 Are we -- what type of weather elements may we
2 encounter?

3 And finally that last bullet, depending on
4 the type of the scene, what type of equipment are we
5 sending out in anticipation of the laboratory
6 products?

7 Q. And you alluded to this a little bit.

8 Can you explain to the Court a little bit
9 about the laboratory team method at the FBI?

10 A. Sure. So in the table, I broke it down by
11 observation, imaging, and measurement. So this is
12 kind of a detailed understanding of those.

13 Here we've highlighted -- or I've
14 highlighted three of the four teams. So the firearms
15 and tool marks unit, which I'm a member of; the
16 operational projects unit; and the evidence response
17 team.

18 The evidence response team -- we have our
19 teams that are spread out throughout the
20 United States.

21 So the second column there, when we deal
22 with imaging, it refers to the responsibilities, in
23 my case as an examiner, to analyze the defects and to
24 begin identifying entrance or exit holes.

25 You see there the other responsibilities

1 for the units, to include photography, imaging,
2 videography.

3 And then finally the last column, in
4 certain situations hand measurements, scan data, and
5 survey data can be collected by those two units there
6 at the bottom.

7 Reinforcing, again, what trajectory
8 analysis is, trying to gather as much information or
9 data that can be used to help articulate what took
10 place.

11 And this can be further enhanced by any
12 type of imaging, which can include photography or
13 videography.

14 Q. And, Mr. Chavez, when your unit is confronted
15 with a Daubert issue, what is your analysis?

16 A. So we're first -- in order to ensure the
17 validity of trajectory analysis, we're challenged by
18 these five different factors, or prongs.

19 And what I can do is walk the Court through
20 those five elements.

21 Q. Okay.

22 A. So the first question is: Is trajectory
23 analysis and the theory of trajectory analysis, can
24 that be tested, or has it been tested?

25 There are different elements that I'm

1 highlighting here: competency testing, proficiency
2 testing, validation, and empirical studies.

3 When I talked about the training program
4 earlier, I dealt -- it dealt with a competency test.

5 Most recently, we all were competency
6 tested on a vehicle, meaning each examiner was
7 assigned to reconstruct this vehicle and take
8 measurements. And from that, develop any type of
9 uncertainty as a result of measurements taken by
10 individual examiners.

11 When I mention proficiency testing, there
12 are accredited forensic test providers that are
13 developing tests to then issue out to forensic
14 laboratories, to include -- the scope of forensic
15 accreditation is something that is being offered by
16 an accrediting body, such as one that the FBI lab is
17 accredited by ANAB, which stands for ANSI National
18 Accreditation Board.

19 And within that acronym is also -- ANSI
20 stands for the American National Standards Institute.
21 And so they also have a scope for trajectory analysis
22 that forensic laboratories can show that they are
23 competent in conducting casework.

24 Validation and empirical studies are often
25 done by examiners, to include researchers or

1 universities, again, further challenging trajectory
2 analysis and those elements.

3 The second factor is, trajectory analysis,
4 can it be -- is it subjected to peer review and
5 publication?

6 The three listed there at the bottom are
7 all common for professional organizations within
8 forensic science. So the AFTE Journal, as well as
9 the American Academy of Forensic Sciences, all have
10 articles relating to trajectory analysis and are
11 constantly challenging specific areas, such as a
12 bullet traveling through different types of material,
13 deflection of a bullet, if a bullet were to fall
14 apart and it creates two separate paths.

15 So there at the top, highlighting,
16 basically, overall in textbooks, reinforce this --
17 these common foundational scientific principles that
18 relate back to physics and math. I need to gather
19 this point X, Y, and Z.

20 Military training guidance, there is some
21 information of a projectile taking flight and how it
22 may impact an end object.

23 And then I highlight the journals there at
24 the bottom.

25 The third element is, what is -- you know,

1 the question is: What is the known and potential
2 error rate for projectile analysis?

3 I mentioned this earlier, about a vehicle
4 being processed by 11 different examiners.

5 So during that process there may be an
6 uncertainty that is developed as a result of the
7 bullet passing through different types of material.

8 In the case of a vehicle, it will first
9 pass through -- say, for instance, the shot was from
10 the driver's side. It will first pass through metal,
11 likely some type of polymer material or liner. It
12 may then pass into a softer object, such as the seat
13 cushion.

14 And so those are different elements where
15 there could be some uncertainty developed as a result
16 of trying to establish a trajectory.

17 The second point there, directionality. In
18 some cases there may be an erroneous determination of
19 a trajectory based on directionality. And so ways
20 for us to mitigate that are highlighted by our
21 quality assurance review process. So ensuring that
22 if there are field notes taken and it is put into a
23 report, that ultimately -- that report will then get
24 a technical or an administrative review prior to
25 issuance.

1 The fourth factor, which questions the
2 existence and maintenance of standards and controls
3 for trajectory analysis, is highlighted by the
4 comprehensive training program.

5 So I mentioned that there are elements that
6 an examiner in training may conduct independently.
7 There are also situations where the examiner will go
8 out with a qualified examiner to better understand
9 different elements that may be encountered on scene,
10 as well as their ultimate qualifications, being able
11 to provide any testimony within the trajectory
12 analysis.

13 The second there, quality system,
14 explaining this a little bit more, is that our
15 laboratory operations manual, our standard operating
16 procedures, all provide sort of that robust insurance
17 that any time we are to go out on scene, it is being
18 handled in a manner that is unbiased to any type of
19 other information, and further supported by the
20 technical, as well as administrative reviews.

21 Lastly, accreditation programs. I
22 mentioned ANAB. There are other accrediting bodies
23 that also look at forensic laboratories to ensure
24 they are meeting their standard operating procedures
25 accordingly.

1 The final factor is questioning whether
2 trajectory analysis is really generally accepted
3 within the relevant scientific community.

4 I reiterate AFTE as being an international
5 professional organization that is comprised of
6 different examiners spread throughout forensic
7 testing laboratories, as well as researchers who are
8 looking at this same concept of this bullet travels
9 through this item, what is occurring, to include
10 academic programs.

11 There are a lot of undergraduate
12 universities, to include graduate universities, that
13 are offering classes or certain elements within their
14 programs.

15 Lastly, in order to have additional
16 validation or empirical studies, grant programs, such
17 as the National Institute of Justice and NIST, offer
18 that element financially to support that.

19 The last bullet point there is that we may
20 see these same types of equipment being used,
21 surveying equipment, when conducting land surveying
22 sites or other tools that are being used along the
23 side of the roads.

24 Q. And how are these results typically reported?

25 A. I broke this up into two different columns.

1 So the responsibility that I have is to
2 ensure that the laboratory report summarizes the
3 team, the location, as well as the time that the
4 examination took place, to include now the results of
5 the examinations, methods and limitations.

6 And it can be further supplemented by
7 graphics. So if you think of that -- of those first
8 three bullet points as the narrative, and the last
9 point is a visual representation.

10 So who was responsible for assisting me in
11 generating that supplemental graphic, that would be
12 the operational projects unit. And so they will
13 generally create graphics or exhibits.

14 And for the graphics, they will have a
15 two-dimensional graphic, just for ease of
16 understanding -- the quick understanding of what took
17 place, so it can be an overhead perspective or a side
18 elevation view.

19 Q. And speaking of the graphic, can you briefly
20 explain how the graphic image is labeled?

21 And you provided us with an example?

22 A. I did, yes. So this example here, I redacted
23 some of the administrative information to include the
24 case number, laboratory number, since it was a part
25 of another investigation.

1 But what is critical to note here is a
2 scale, the regimen, or key, there at the bottom
3 right, that for green, blue, and that orange bullet,
4 impact and trajectories.

5 And for the purpose of the narrative, when
6 I talk about these trajectories in the report, I
7 broke it up by vehicle quadrant. So you can see in
8 each corner, front driver, rear driver, and passenger
9 side. It's further kind of broken up by that
10 crosshair, so you have that designated quadrant.

11 In the case of Hole 6, 5, and 4, you can
12 see that those three holes are connected, meaning
13 that they create a line that is then labeled by our
14 Trajectory 1.

15 Where it's labeled also indicates
16 directionality, which is then further supported by
17 the report. Meaning in the report, it will likely
18 read that a trajectory was established and originated
19 from the front driver's side, connecting Hole 6, 5,
20 and 4.

21 Q. Thank you.

22 You were asked to conduct a firearm
23 trajectory analysis in the case of United States
24 versus Douglas Smith.

25 Is that correct?

1 A. That's correct.

2 Q. And as part of this request, you were deployed
3 to Espanola, New Mexico, on August 22, 2019?

4 A. That is also correct.

5 Q. And could you explain what you did, when you
6 arrived on scene in Espanola?

7 A. So the laboratory decided to send out just
8 myself as an examiner, serving as the lead for this
9 project. And so upon arriving to the Santa Fe
10 resident agency, I met up with the team that was
11 comprised of the agents there in Santa Fe, as well as
12 the evidence response team that was pulled from the
13 Albuquerque field office.

14 Q. And as part of your deployment, what type of
15 information were you interested in at the scene, and
16 what did you observe when you got there?

17 A. So for any shooting incident, we are capturing
18 field notes that indicate holes or impacts that we
19 are interested in, as part of this investigation, to
20 include photographs and any type of data, whether
21 that be hand measurement, survey, or scan data.

22 Q. And at the scene in Espanola, did you find
23 evidence of bullets or impacts?

24 A. Yes, we did. So arriving on scene, the team
25 basically did a line search. And so what that

1 entailed is, based on limited information that we
2 knew about the incident, we did sort of a sweep of
3 the property.

4 And as we located areas that were suspect
5 of being bullet holes or impact points, we labeled
6 them.

7 I labeled them by designator of Hole 1 or
8 Hole 2, depending on the surface being examined.

9 And it was at that point, upon labeling,
10 that I directed the photographer to begin collecting
11 information about those areas of interest.

12 Once the photographs were taken, then I
13 directed the evidence response team members to begin
14 collecting survey or scan data of that area of
15 interest.

16 Q. You may describe this in more detail later.
17 But generally, can you describe how many holes you
18 found and where they were located?

19 A. Again, looking at the entire property and doing
20 a line search of the property, there were two areas
21 that we would designate as areas of interest. That
22 being a metal shed adjacent to the main property, as
23 well as a trailer that was just located outside of
24 the fenced area.

25 Q. And once you collected all of this information

1 on scene, what did you do with that?

2 A. Generally, the information for the
3 photographer, as well as the scan and survey data, is
4 handled according to their procedures. It's my
5 responsibility to take my field notes back with me to
6 the lab and then request information from the
7 photographer, mainly, of a copy of their photos.

8 And so the scan data and survey data,
9 getting back to the operational projects unit, they
10 will get that data upon return back to the -- to
11 their office and be handled that way.

12 Q. And as part of your analysis, did you examine
13 any additional evidence in this case, besides what
14 you've described?

15 A. No additional evidence, no.

16 Q. And why is that?

17 A. In typical cases that involve shooting
18 incidents, we try to prevent any information that
19 relates to the physical evidence from the examiner
20 going out on scene. So an unbiased approach, if you
21 can say that, where the examiner who is going on
22 scene knows little information about the physical
23 evidence.

24 Or if I am working the evidence itself, I'm
25 not relaying information back to the examiner on

1 site.

2 Q. And did you generate a report and a graphic
3 image associated with that report in this case?

4 A. Yes, I did.

5 Q. If I can show you what's been marked for
6 identification as Government's Exhibits 5 and 6.

7 Would you please take a look at that and
8 let me know if you recognize it?

9 Do you recognize that, sir?

10 A. Yes, I do. That is the -- I recognize it first
11 by the Laboratory Number 2019-2375. And that should
12 be a footer for each of those pages.

13 Q. And approximately how many pages is your
14 report?

15 A. Three pages. And if you go back to the first
16 one, it also indicates there was a supplemental
17 graphic of one page.

18 Q. And that's marked as Government's Exhibit 6?

19 A. Yes. And the lab number located there at the
20 bottom right is how I recognize it.

21 Q. Thank you. And are these fair and accurate
22 depictions of your report and the associated
23 graphics?

24 A. They are.

25 MS. WILSON: I move Government's Exhibits 5

1 and 6, Your Honor.

2 And I would also ask the Court to allow
3 Mr. Chavez to annotate both exhibits during his
4 testimony during this hearing.

5 THE COURT: Is there objection to
6 Exhibits 5 and/or 6, Mr. Elsenheimer?

7 MR. ELSENHEIMER: Not for purposes of this
8 hearing, Your Honor.

9 And I don't have any objection to
10 Mr. Chavez annotating that for purposes of this
11 hearing.

12 THE COURT: All right. So 5 and 6 are
13 admitted for today's hearing.

14 And then yes, the witness can annotate.
15 BY MS. WILSON:

16 Q. Mr. Chavez, do you have that there? And if you
17 could, walk us through your report -- the findings,
18 the methodology, and the limitations.

19 A. First, just note the administrative section
20 here in green. First, by who requested us to go out,
21 the approximate date of that request, when we were on
22 site. I mention the lab number. And also an
23 understanding of what H, what I, and what T mean.

24 And in this case, highlighted here is we're
25 using a compass direction to allow for information of

1 where the trajectory originated from.

2 I'm going to clear this section and move on
3 to page 2.

4 Q. Okay.

5 A. So on the top section are the results of the
6 examination. So in this case you see here now T1,
7 which is comprised of Hole 2 and Impact 1. And then
8 Hole 1, that was located on the corner of the
9 trailer.

10 It's also a requirement, for us to have the
11 methodology and limitations as part of the report,
12 indicating how we collected the information or how
13 the data was collected.

14 And then also in the limitation section,
15 what certain limits may be impacted by the X, Y, and
16 Z. So certain coordinates that are critical to put
17 in a point in space, further supporting connecting
18 those two points to create a line.

19 The final page -- and I'll clear the
20 drawings here.

21 The final page, we'll just highlight the
22 remarks section. So again, the person who was
23 responsible for generating the graphic, and then
24 myself as the author of this report, to include the
25 opinion there.

1 And the supplemental graphic that
2 accompanies this report. So again, viewing the
3 results as the narrative, this is more of the visual
4 component of the report. The lab number there at the
5 bottom. The lab number at the bottom, and the report
6 date of February 3, the case ID.

7 And in this case we have Hole 1, Hole 2,
8 and Impact 1.

9 I mentioned earlier the areas of interest.
10 And those areas I'm going to highlight in red. That
11 would be this trailer and this metal shed.

12 Lastly, at the top left is a snapshot of
13 the area that would be viewed within this diagram.

14 Q. And in your opinion, based on your observation,
15 the data that was collected, your report, and the
16 associated graphic, were multiple bullets fired by a
17 gun that you were to determine?

18 A. Yeah. So a part of the methodology for
19 trajectory analysis allows us to look at each area
20 independently.

21 And so for Hole 1, there was significant
22 damage at the corner of that, that would indicate the
23 bullet likely impacted that and deflected or was
24 unstable versus Hole 2, connecting to Impact 1, was a
25 separate shot based on the damage to the television

1 screen, as well as the entry of that bullet into the
2 corrugated metal.

3 Q. And were you able to determine directionality
4 associated with those impact points?

5 A. Yes. So each location or hole or impact is
6 also -- we observe the characteristics. So there are
7 certain elements, such as the metal being pulled
8 back, that will indicate directionality.

9 As well as in the case of the Hole 2 to
10 Impact 1, we observed -- or I observed the
11 continuation of that damage to a second item, further
12 supporting the connection between those two areas.

13 Q. And based on your review of the data and
14 analysis in this matter, is it your opinion that all
15 standard FBI procedures were followed?

16 A. Yes, they were.

17 Q. And the results were peer reviewed?

18 A. By "peer reviewed," do you mean a
19 technical/administrative review?

20 Q. Yes.

21 A. Yes, they were.

22 MS. WILSON: Your Honor, I pass the
23 witness.

24 THE COURT: All right. Thank you.

25 Mr. Elsenheimer, you may cross-examine the

1 witness.

2 CROSS-EXAMINATION

3 BY MR. ELSENHEIMER:

4 Q. Good morning again, Mr. Chavez.

5 A. Good morning.

6 Q. I want to ask you about your report a little
7 bit. So it's a three-page report that is followed by
8 46 pages of documentation.

9 Is that right?

10 A. So -- I'm sorry. The report itself is three
11 pages, with one supplemental graphic.

12 Q. The supplemental graphic is the -- is the
13 trajectory image that we just looked at.

14 Is that right?

15 A. That is correct.

16 Q. There are also written notes that -- at least
17 that I have of yours.

18 Is that part of your report in this case?

19 A. We commonly refer to the report as being the
20 three-page document, then supported by a supplemental
21 graphic.

22 Q. Okay. Well, I have one -- pages 1 through 46,
23 and they consist of two written pages, and then a
24 number of photographs.

25 They -- the written pages, are those

1 your -- is that your handwriting?

2 Let me show you the page that I'm referring
3 to.

4 A. Sure.

5 Q. Can you see that?

6 A. Yes. Will you scroll to the bottom, so I can
7 see the footer?

8 Q. Certainly.

9 A. I do recognize that by the laboratory number,
10 as well as the pagination, the date, and my initials
11 at the bottom.

12 Q. So this is a document that you wrote?

13 A. This is commonly referred to as our supporting
14 documentation. So when a report is generated, these
15 would be the field notes put in as part of a
16 discovery packet.

17 Q. I see. Are these your field notes? Like did
18 you write this?

19 A. Yes, I did.

20 Q. Okay. Following that -- those pages, I
21 received a number of pictures. They seem to have FBI
22 Lab Number 2019-2375-2.

23 Let me show you the first of those.

24 Do you see that image? And I'll try to get
25 it rotated correctly.

1 Is this an image that you reviewed for
2 purposes of your report, or is it an image that you
3 had taken?

4 A. It is an image that I reviewed, but an image
5 that I directed someone to take.

6 Q. I see. So it was taken on August 22 of 2019?

7 A. That would have been the time, yes. The
8 photographer was on site with me.

9 Q. Let me go back to that handwritten page.

10 Are you able to see this clear enough to
11 read the writing?

12 A. I am. And I also have a laptop here. If you
13 may -- if you could zoom in just a little bit?

14 Q. Sure.

15 A. Okay.

16 Q. Is that better?

17 A. That does help, yes. Thank you.

18 Q. Can you tell me if -- there are three
19 hashmarks. The second hashmark starts with H1.

20 Can you tell me -- I'm having a difficult
21 time reading the third line down from that.

22 It's -- the first part of it says 2, and
23 then I think it is additional. And then I can't read
24 beyond that.

25 Can you tell me what that says?

1 A. Yeah. So it starts with an arrow. That is two
2 additional areas were tested. In parentheses is the
3 acronym BTK, which stands for bullet testing kit,
4 below H1. And the lead, which is referred to as Pb,
5 and copper, Cu, were negative.

6 Q. Okay. So I'm going to ask you about that.

7 So we're refer- -- this is referring to the
8 hole that is identified as H1.

9 Is that right?

10 A. What I read is referring to two additional
11 areas that were tested below H1.

12 Q. Oh, I see. And where were those areas?

13 A. When conducting a bullet testing kit of a
14 suspected area, what we will -- what I will do is
15 take a negative to ensure that they -- there isn't
16 anything on that material that would produce an
17 erroneous positive test for bullet or lead.

18 So in this case, I chose two areas a
19 distance away from Hole 1 and tested them both for
20 copper and lead, and they were negative.

21 Q. Let me ask you about the -- the third hash that
22 says H2.

23 Could you read that for me, just so that I
24 make sure I know exactly what it says?

25 A. Sure. So it starts with H2, located on

1 corrugated metal shed that is adjacent to property.
2 In parentheses, main house. Exterior of east facing
3 rear door, consistent with entry -- entry -- I'm
4 sorry.

5 May you zoom in just a little bit?

6 Q. Certainly. Is that better?

7 A. I'll continue. Entry hole and material inward.
8 Upon opening of shed, visible damage was noted on
9 some items within the property. And in parentheses,
10 shed.

11 Q. Thank you. Let me ask you about that.

12 Upon -- so my understanding from this, and
13 you tell me if I'm wrong. But if I'm opening the
14 shed, you noticed visible damage.

15 What damage did you notice? Like what is
16 that in reference to?

17 A. That's referring to the direction. So first,
18 looking at Hole 2, indicating that metal or material
19 is inward, which to me indicates that the bullet was
20 traveling from outside in.

21 So following the path of that bullet, or
22 projectile, and then looking at any material within
23 the shed.

24 So first, just taking a clockwise approach
25 and basically, again, doing sort of a line search, or

1 in this case a wall search, of any items that may
2 have been damaged.

3 So there was visible damage no- -- noted on
4 a television screen that resulted in, also, some
5 glass falling. So those were indicators that damage
6 was visible.

7 Q. Were any other items damaged in this shed,
8 aside from the television screen?

9 A. No other items, but focused only on the
10 television screen.

11 Q. Let me ask you about the next hash. It has
12 I -- it has I2 struck out, and then it has I1.

13 Would you mind reading that for me, please?

14 A. Sure. So it is a -- I1. A common quality
15 measure in our lab is to just single strike out,
16 initial, and date. So that I am actually just
17 crossing that out and rewriting Impact 1, located on
18 television screen that is on the southwest corner of
19 the interior that contains damage and other breaks in
20 the glass. This damage displays a radial pattern.
21 Bullet testing kit, or testing of lead positive,
22 copper negative.

23 Q. And then what does the next hash say? What
24 does the writing after the next hash say?

25 A. That begins with, Upon review of damage there

1 may be fragments that continue through the interior
2 of the television.

3 Q. Thank you. And then how about that last --
4 those last two lines? Would you mind reading those,
5 because I can't quite tell what they say.

6 A. Sure. Review television and surrounding area
7 that may contain some additional evidence.

8 Q. What does that mean? Did it say review
9 television, surrounding area?

10 Did you take any tests or was it just a
11 visual review?

12 A. The last two statements that I just read were
13 reminders for me to relay that information to our
14 evidence response team, who are responsible for
15 collecting any additional evidence. So they were
16 just a reminder for me to have that conversation with
17 the team leader.

18 Q. Is it Officer Chavez or how do you -- is it
19 Agent Chavez? What's your appropriate designation?
20 I don't want to get it incorrect.

21 A. I'm a qualified examiner, so Theo Chavez is
22 fine.

23 Q. You -- was the first time you visited
24 825 Riverside Drive on August 22, 2019?

25 A. That is correct.

1 Q. Did you -- are you familiar with the date of
2 the incident giving rise to the allegations in this
3 case?

4 A. I -- no, I had no indication of the date of
5 incident.

6 Q. You don't know how long it was before you
7 visited there in August of 2019?

8 A. The only information -- I think that it was
9 several months, but no details.

10 Q. When were you first contacted about this case?

11 A. Around the time frame of August 19, which would
12 reflect the date on my laboratory report.

13 Q. So it was shortly before you visited
14 825 Riverside on August 22?

15 A. Using that date to, yes, form and develop a
16 team which, again, would just be myself, from --

17 Q. And just to make sure -- okay. Thank you.

18 Just to make sure I am clear on this, you
19 didn't review any other documentation about this
20 case, any witness statements, photographs, anything
21 like that?

22 A. No. And that goes to the unbiased approach for
23 this examination, specifically. Just reviewing the
24 data on site.

25 Q. In addition to what is in your report, is there

1 anything else -- are there any other conclusions that
2 you drew about this case, or findings that you made,
3 that are not included in this report?

4 A. No. The 46 pages, or records, would be any
5 physical records that are contained. The only other
6 information that was also, I believe, part of the
7 discovery packet, would be the chain of custody or
8 any technical or administrative reviews that were
9 conducted as a result of this report being issued.

10 Q. Did you personally take any of the measurements
11 that are used in your report?

12 A. No, I did not. And the reason being is, there
13 are individuals who are trained to run the equipment,
14 such as the scanner, or are also trained to
15 photograph areas within the FBI's procedures.

16 Q. And by the scanner, you are referring to the
17 FARO scanner.

18 Is that right?

19 A. I don't know if it was a FARO scanner. I just
20 commonly refer to it as a scanner.

21 Q. Okay. Let me ask you about the tests that you
22 personally conducted.

23 You've mentioned a bullet testing kit.

24 Can you describe that bullet testing kit
25 for us? What does that test consist of?

1 A. So it is a presumptive color chromophoric test,
2 meaning that I am using positive controls to test a
3 site.

4 Given the fact that I knew it was several
5 months prior to the shooting, I will test the
6 location to ensure and further support that it was a
7 hole, or an impact, and that I also wasn't getting
8 any false positives from the surface just because it
9 may have been in contact or been comprised of any
10 type of lead or copper material.

11 Q. How did you ident- -- you've mentioned there's
12 H1 and there's H2. And those both describe bullet
13 holes, or holes that you found that you believe are
14 associated with a bullet.

15 Is that right?

16 A. Those are two labels that I would have placed
17 on two different areas, correct.

18 Q. How did you find H1 and H2?

19 A. Upon arriving to the scene, we did a line
20 search to locate any areas that were suspect of
21 having damage as a result of a bullet.

22 Upon review of the property, we then
23 identified two areas of interest, that being the
24 trailer and adjacent metal shed.

25 Further detail and observations of that

1 resulted in labeling, physically labeling, those
2 holes and impacts that I wanted further information,
3 or being gathered from, specifically, photos, as well
4 as scan data.

5 Q. You were with agents from the FBI field office
6 in Santa Fe when you visited 825 Riverside Drive,
7 correct?

8 A. That's correct.

9 Q. Did they point those holes out to you?

10 A. No. The agents from Santa Fe were primarily
11 responsible for ensuring that the scene was secure,
12 given that we were in close proximity to a major
13 driveway -- or highway.

14 So they were providing scene protection for
15 us, and allowing us to conduct the examination.

16 Q. Did you do any other tests, aside from the
17 bullet testing kit?

18 Did you do any laser tests, anything like
19 that?

20 A. No, just the bullet testing kit.

21 Q. Did you -- so you found -- let me just clarify
22 this.

23 You found the holes by just looking for
24 them? I'm still not entirely clear on how you found
25 these two particular holes.

1 A. That is correct. So the procedure for us is
2 to -- any type of shooting incident, and in this
3 case -- arrive on site, begin just doing a general
4 observation. And these are individuals who are
5 trained to respond to shooting scenes or other
6 scenes, and locate items of evidence.

7 In this case, we're looking for areas that
8 were of interest. So did it display any features
9 that were consistent with a bullet either having
10 passed, grazed, or impacted?

11 And so in this case we started in a
12 clockwise manner going through the property and
13 locating those areas and then labeling after that.

14 So yes, it was a matter of a line search
15 for a review of the entire property.

16 Q. Now you mentioned in your report using your
17 survey equipment or laser scanner devices. So you're
18 saying that no laser scanning device was used in your
19 trajectory analysis in this case?

20 A. No. I believe the question was if I used
21 lasers.

22 Q. Right. Did you use lasers?

23 A. No. Lasers were not used in this case.

24 Q. Can you use lasers as part of ascertaining what
25 a particular bullet's trajectory is?

1 A. If you are referring to lasers in a photograph,
2 those are common practices for generating an
3 investigative photograph, but it is not a requirement
4 to use lasers. The only time that is being used is
5 when a photograph needs to be released for
6 investigative reasons.

7 But in this case a supplemental graphic
8 using the data collected was generated.

9 Q. Let me ask you this.

10 Your report says that suspected bullet hole
11 impacts were examined to determine whether they have
12 physical defects consistent with having been caused
13 by a bullet or debris.

14 In this case, what was done to determine
15 whether they were consistent with a bullet or debris?

16 A. So based on my training and experience, and
17 having looked at different types of materials being
18 encountered by bullets, these displayed
19 characteristics such as the peeling of the material,
20 further supported by the color chromophoric test of
21 lead and copper that further supported it being a
22 result of a bullet passing through it. The term
23 "bullet" and "projectile" can be used
24 interchangeably.

25 When we talk about debris, there are

1 chances for a bullet to pass through an intervening
2 object and then separate, meaning the lead core can
3 separate from the jacket material, and so it could
4 potentially take two different paths.

5 But in this case, Hole 1 and Hole 2 were
6 treated independently based on the type of
7 characteristics that were displayed on the surface.

8 Q. Let me ask you about that color chromographic
9 test. Do I have it correct, color chromographic
10 test?

11 A. Color chromophoric test.

12 Q. I'm sorry. Chromophoric. Is that something
13 where you kind of get a rubbing from the H1 and H2
14 and you test it to see if it has lead residue or
15 copper residue?

16 A. So when I mentioned color chromophoric, it is a
17 visual test, meaning that when you apply the paper
18 onto the surface using some acid, it will appear
19 purple for lead and sort of an orange color for
20 copper -- excuse me, not orange -- but forest green,
21 if you will.

22 And so it's a color chromophoric test that
23 is done. And by the positive control being done
24 using known lead, known copper, comparing those two
25 together, further supports. They're not independent,

1 so you're using the characteristics of the hole
2 itself to also conduct that test.

3 Q. Did you -- did the -- let's talk about H1.

4 You did that test on H1. What was the
5 results of H1?

6 A. If I could refer back to my notes, if that's
7 possible?

8 Q. Your notes or your report? You want your field
9 notes?

10 A. Yes, the field notes.

11 MR. ELSENHEIMER: Your Honor, if I could
12 have just a moment to get those?

13 THE COURT: You may.

14 BY MR. ELSENHEIMER:

15 Q. Are those the notes that you're referring to,
16 sir?

17 A. Yes.

18 And may you repeat your question?

19 Q. Sure. I'm just wondering, with regard to H1,
20 did you do that color chromo- -- did you do that BTK
21 test?

22 A. Yes, I did.

23 Q. And what were the results of that test from H1?

24 A. For H1, it was positive for lead and positive
25 for copper.

1 Q. What does the fact that it's positive for
2 copper tell you?

3 A. Well, again, it doesn't stand alone. But in
4 this case, it will say that there is copper and lead
5 embedded within that damaged area around Hole 1.

6 Q. I see. And then for H2, did you do the BTK
7 test for H2 as well?

8 A. No, I did not.

9 Q. You didn't do it -- for the hole in the
10 corrugated shed, you did not do a color chromophoric
11 test?

12 A. No, I did not.

13 Q. Did you do one on the television set that you
14 located inside the corrugated shed?

15 A. Yes, I did.

16 Q. What were the results of that?

17 A. The results were a positive copper -- excuse
18 me -- a positive lead and a negative copper.

19 Q. Did you look -- when you visited 825 Riverside
20 Drive on August 22 of 2019, did you look in the
21 woodpile for any impact sites or any holes?

22 A. Yes, we did. That was part of the -- again,
23 working clockwise. That sort of would have been the
24 second area that we would have reviewed for any
25 potential damage.

1 However, I do recall there being a lot of
2 debris and tall weeds. So there was a -- a review
3 done of that -- that area, and it would have included
4 the wood that would have been piled up.

5 Q. And did you also look at any of the trees or
6 limbs from the trees to see if there were any bullet
7 holes in those?

8 A. We did. And in fact, I do recall several
9 instances where individuals had thought they had seen
10 a hole. But in fact, it was just a knot in the wood.

11 So again, that's just -- they're doing
12 their job by surveying the area, just trying to find
13 any damage or hole. And then it is up to me to go
14 back and review that and determine whether or not it
15 meets the requirements or has any characteristics for
16 being the result of a projectile or bullet.

17 Q. The knot, or the hole, is that something
18 that -- so this was in August of 2019.

19 If the incident took place a year and a
20 couple of months prior, is that knot or hole
21 something that you may have missed because of the age
22 that elapsed between the date of the incident and the
23 date that you did your investigation at the property?

24 A. That is something we considered. However, we
25 were evaluating the property as we were on site. So

1 there wasn't any reason to cut into any material.

2 Q. Let me ask you about the trajectories.

3 There's something that you've labeled as
4 T1.

5 What does that stand for?

6 A. There is one single trajectory, so T stands for
7 Trajectory 1.

8 Q. I'm going to bring up your diagram, because I
9 want to ask you about that. It might be helpful for
10 you to refer to it.

11 Now, that is the only trajectory that you
12 were able to ascertain.

13 Is that correct?

14 A. Those two points creating that trajectory, yes.

15 Q. And by the two points, are you talking about H2
16 and I1?

17 A. Hole 2 and Impact 1, yes.

18 Q. Okay. Now, you -- I believe, and tell me if I
19 am wrong. But I believe that you said that that
20 originated from a northeast direction.

21 Is that correct?

22 A. I believe I stated north, northeast direction,
23 correct.

24 Q. You didn't have a point of origin for where the
25 bullet originated that you believed caused H2.

1 Is that correct?

2 A. Correct. That's one of the limitations for
3 trajectory analysis, that we don't utilize any
4 information, nor do we put a shooter back at a
5 specific point.

6 Rather, we provide just sort of an
7 objective perspective of where that shot originated
8 from. So that way it provides some context of where
9 it originated, and also where additional evidence may
10 be collected along that line.

11 Q. Is there any way to date the age of H2?

12 And by that, I mean are you able to
13 determine when it was caused or -- yeah. Are you
14 able to determine when it was caused?

15 A. No, I'm not able to.

16 Q. So let's say, for example, that someone had
17 fired a shot on Day 1, and then six months later
18 fired another shot, and then a year later you go and
19 find H2.

20 Is there any way for you to determine that
21 it was fired on Day 1 or six months later on Day 2?

22 A. Aside from the hole being subjected to the
23 elements, there may be some rusting or other features
24 that are a result of just the metal being broken.

25 But no, not being able to decipher if a

1 shot was, as you mentioned, sort of a year ago versus
2 present day.

3 Q. You wouldn't be able to make that
4 determination, aside from maybe having rusting or
5 something like that.

6 Is that right?

7 MS. WILSON: Your Honor, I'm going to
8 object; asked and answered.

9 BY MR. ELSENHEIMER:

10 Q. Well, did you see rusting anywhere on the H2?

11 A. I don't recall rusting being present. However,
12 I believe there was a hornet nest kind of in the
13 vicinity of that hole.

14 Q. And similarly for H1, is there -- I want to ask
15 you about that.

16 Is there any way to date the age of H1?
17 Would you be able to say if bullets were fired in
18 January of 2018 and again in May of 2018? Is there
19 any way to say that the bullets -- the bullet that
20 caused H1 came from January or May?

21 A. No way to determine that, no.

22 Q. Did you determine a point of origin for H1?

23 A. I'm sorry, the audio cut out.

24 Will you repeat the question?

25 Q. Certainly. Were you able to determine a point

1 of origin for H1?

2 A. Yes. So there were some characteristics of
3 Hole 1 that allowed for me to determine that it
4 originated from the north, northeast direction.

5 Q. But again, you were unable to decipher a
6 particular point of origin for the bullet that caused
7 H1?

8 A. Not a particular point of origin. That's
9 correct.

10 Q. Your report says that H1 cannot be associated
11 with a trajectory.

12 Is that right?

13 A. That is correct.

14 Q. So without knowing the point of origin of
15 either H1 or H2, wouldn't it be possible for a bullet
16 to be fired and hit at H1, to ricochet and become the
17 bullet that caused H2?

18 A. There may be instances where that can occur,
19 just to -- just because of the close proximity.

20 However, the flip side of it is that we
21 also have to treat them independently.

22 So by looking at the characteristics that
23 are displayed by Hole 1, significant damage was noted
24 that would indicate the bullet likely became
25 unstable, when compared to Hole 2, which had a

1 material going through the corrugated metal and
2 significant damage into the television screen.

3 Q. Let me ask you about Hole 1. You said there's
4 significant damage associated with that.

5 What was the significant damage that you
6 observed?

7 A. "Significant damage" meaning the -- if you look
8 at the detail of a hole, certain features -- that may
9 be the pulling back of the material, the damage of
10 the surface that it's encountering, as well as any
11 type of characteristic of that hole that isn't just a
12 matter of a bullet basically grazing it.

13 So it caused enough damage for it to be
14 unstable, the bullet to be unstable.

15 Q. Did you conduct a test to determine that it was
16 the type of hole that would indicate that the bullet
17 became unstable?

18 A. No, I did not. But that is just a matter of
19 training and experience, having looked at other types
20 of material similar to metal.

21 Q. So you're saying that you just kind of base
22 that on just observing this particular impact site.

23 Is that right?

24 A. Yeah. Correct. Observations of those holes
25 independently.

1 Q. So you didn't do any type of testing of that
2 particular hole at H1, on the side of the camper
3 trailer, to find out if the impact could have
4 resulted in a ricochet.

5 It's just based on your observation of it
6 and kind of your hunch based on that observation.

7 Is that right?

8 A. So based on the hole itself and the testing
9 that was done, would have indicated that this was a
10 result of a bullet encountering that hole.

11 Separate from that, I'm not using any
12 information such as prior statements or reports that
13 would try and connect the two.

14 Rather, if a hole or an impact is being
15 observed, it's treated independently and reported out
16 as such.

17 Q. Well, let me ask you a little bit about the
18 camper trailer itself.

19 Did you do any tests of the metal of the
20 camper trailer to find out if it was the type of
21 metal that would have caused a bullet to become
22 unstable?

23 Because I'm sure that different metals
24 would have different effects on the trajectories of
25 certain bullets and on whether or not they become

1 unstable.

2 A. I did not conduct any separate tests. However,
3 in this case, it hit the corner of the metal versus
4 actually passing through the metal.

5 So if it were to have passed through the
6 metal, that bullet likely would have lost some of its
7 velocity.

8 However, hitting the corner metal, it does
9 ultimately become unstable and is no longer in a
10 straight path.

11 Q. Just because a bullet is on -- not on a
12 straight path doesn't mean it's not going to
13 ultimately travel to a certain place and make an
14 impact.

15 Is that not right?

16 A. Correct. So it may continue on, but it has
17 lost some velocity and has also become unstable;
18 therefore, the path is sort of unknown on where that
19 projectile will go or end up.

20 Q. My point is, it could have been the bullet that
21 caused H2. You just don't know, because there's no
22 way to say?

23 A. The observations of the damage, we're treating
24 them two -- as two separate shots. Again, just based
25 on their location and the type of damage that was a

1 result of the bullet passing through Hole 1 and into
2 Impact 1.

3 Excuse me. Hole 2 and into Impact 1.

4 Q. And what is it about Hole 2? Did you conduct
5 any studies of the metal of Hole 2 to find out if
6 that's the type of metal that would have reacted in a
7 certain way to an unstable bullet or a stable bullet?

8 A. So the way that the corrugated metal was
9 positioned, the bullet would have actually come into
10 contact in a relatively 90-degree angle. So it would
11 have impacted any metal behind it, simply just the
12 thickness of the material, which then would have
13 allowed for it to pass into and ultimately impact the
14 TV screen.

15 So these, again, are all observations just
16 based on the features of a hole and any type of
17 object that is within its path.

18 Q. Right. But you didn't conduct any test of the
19 metal of the corrugated shed, did you?

20 A. No specific tests of the metal.

21 Q. You mentioned in the tree -- or the limbs that
22 you saw, there were knots that someone pointed out.

23 Is that right?

24 A. I recall the knots being on the fencepost that
25 may have been close to where the lumber was piled up.

1 Q. You didn't notice -- did you notice -- you or
2 anybody on your team -- notice anything in any of the
3 trees that could have been bullet impacts?

4 A. The trees were searched, but no bullet impacts
5 were located.

6 Q. You mentioned that when -- and you did look at
7 the woodpile that was on the property. And you
8 mentioned other debris. Let me ask you about that.

9 Why was it that you weren't able to find
10 any holes or bullet impact sites? Was it because of
11 the debris that was around the woodpile?

12 A. No. The debris did not prevent us from
13 observing any potential impacts; rather, it was just
14 that we would have had to have moved equipment to try
15 and look at or make additional observation.

16 So it was a matter of the, I believe, weeds
17 or other trash that was in that location that
18 prevented us from doing any sort of detailed search.

19 But nothing -- once we were able to get
20 past that point and look on the opposite side, we
21 were able to observe some of those areas for any
22 potential damage.

23 THE COURT: Mr. Elsenheimer, how are you
24 doing on time?

25 MR. ELSENHEIMER: Your Honor, I have -- I

1 definitely have a few more questions. I know
2 Your Honor wanted to finish early today, so I will
3 wrap up my examination.

4 Could I at least, for right now, have ten
5 more minutes --

6 THE COURT: Yes.

7 MR. ELSENHEIMER: -- and then maybe a
8 little bit longer? Okay. And again, I might go a
9 little longer. I don't exactly know.

10 BY MR. ELSENHEIMER:

11 Q. Mr. Chavez, let me go back to your report.

12 In your report you say that the direction
13 of travel can be determined by the nature of the
14 damage around the holes, the direction of transport
15 of additional material, and the lack of an exit hole
16 on one end of the trajectory, or the recovery of a
17 bullet or bullet fragment from one end of the
18 trajectory.

19 So we've been talking about H1 and H2 and
20 your conclusion that these are two separate shots.

21 That -- the test -- and I want to ask you
22 about the tests that you used to reach that
23 conclusion.

24 My understanding is that the test that you
25 used really was the bullet testing kit, which is to

1 find out if there is lead or copper associated with
2 H1 or H2, and then the rest of that was your own
3 observations, and that's it.

4 Am I wrong in that assessment?

5 A. You are not. So the field notes, along with
6 the bullet testing kit and the photographs and the
7 on-site observations all support the results of those
8 two holes being independent.

9 Q. But that's really just observation. It's just
10 your kind of observational conclusion. You didn't
11 conduct any type of laser examination, you didn't
12 conduct any type of additional tests that would
13 support or that would verify or -- or not verify that
14 particular observation.

15 Isn't that right?

16 A. And to clarify, lasers -- when lasers are used,
17 that is just a visual representation of the
18 observations that are made, so connecting two points
19 with a manner of lasers and fog.

20 But no additional procedures were -- were
21 done in this investigation.

22 Q. Can you say that last part again, because you
23 cut off right as you were saying that. I'm sorry
24 about that.

25 A. Yes. So all observations were made as part of

1 this examination, meaning that lasers were not used.
2 There was no requirement for it.

3 But all field notes, photography, and data
4 being collected by the scan and survey data, was done
5 in this case.

6 Q. Okay. So let me just ask you again, because I
7 want to understand this.

8 A bullet, when it becomes unstable, that
9 bullet can still cause a hole and result in an impact
10 site, correct?

11 A. That's correct.

12 Q. And it exclusively depends on how that unstable
13 bullet enters or hits whatever it ultimately hits?

14 A. To include the ground, correct.

15 Q. Absolutely. And so let's say, for example,
16 that a bullet hits the side of a shed -- of a -- the
17 side of anything, and it becomes unstable and it
18 begins to wobble, right?

19 So when that bullet makes the next hole in
20 whatever it hits, it depends on where it hits in the
21 course of its unstable wobbling, for lack of a better
22 term.

23 Isn't that right?

24 So if it hits at the right angle, it's
25 going to cause the same type of hole that a bullet

1 that didn't hit anything, an unobstructed bullet,
2 correct?

3 A. May you repeat that? I'm sorry.

4 Just when it does impact something and
5 its -- I'm sorry -- its shape.

6 Q. So if an unstable bullet is traveling through
7 the air and it hits the side of a metal building, the
8 hole that it creates, when it hits the side of that
9 metal building, depends on how it entered that metal
10 building, correct?

11 A. That is correct.

12 Q. And that hole could look like -- could look
13 identical to the hole created by a bullet that was
14 not unstable?

15 A. Correct. The term we commonly use is a
16 keyhole.

17 Q. So the keyhole could be the same for an
18 unstable bullet or a stable bullet?

19 A. The keyhole will depend on the type of material
20 that it's passing through.

21 Where we typically see a keyhole is when
22 a -- it's in a drywall material. So when a bullet
23 becomes unstable, it will pass through, potentially
24 the shape, the overall shape of that bullet, and
25 appear as if it is a keyhole.

1 Q. Right. So just-- so there's no way to
2 determine conclusively, based on a keyhole, whether
3 the bullet that caused it was stable or unstable?

4 A. Dependent on -- it's dependent on the material.
5 So in some cases, we can determine that a bullet was
6 unstable based on the profile or shape of that hole.

7 There are features or characteristics that
8 would indicate a bullet having passed through without
9 any type of intervening object versus a bullet that
10 is unstable. All dependent, though, on the type of
11 material.

12 Q. So there's nothing about Hole H2 in the
13 corrugated shed that you can conclusively say was
14 caused by a stable bullet, correct?

15 A. That's incorrect. So I cannot state that
16 Hole 2 is taking the shape of an unstable bullet.

17 Q. But it could be?

18 A. That is also possible. However, Hole 2 has
19 additional information behind it, that being
20 Impact 1.

21 So collectively using all the information
22 about that hole and its proximity, Hole 2 connects to
23 Impact 1. Therefore, that bullet is still in stable
24 condition when it passed through the material.

25 MR. ELSENHEIMER: May I have a moment,

1 Your Honor?

2 THE COURT: You may.

3 BY MR. ELSENHEIMER:

4 Q. Does the weather on a particular occasion or
5 the wind on a particular occasion affect your
6 analysis, trajectory analysis?

7 A. No, it does not.

8 Q. So you did this -- your field tests in
9 August -- on August 22, 2019, and the incident in
10 this case was a year and, I believe, three months
11 prior to that.

12 So over a year and three months later,
13 small changes in the location of the TV or the
14 location of the trailer, that could affect your
15 trajectory analysis.

16 Isn't that right?

17 A. That information -- again, any type of prior
18 location isn't reflected in the work or examination
19 that was conducted on August 22.

20 So the report, as well as the supplemental
21 graphic, speaks to the examination conducted on
22 August 22.

23 Q. Okay. And there's nothing about -- and I
24 understand that, because you want to be objective.

25 But what you're not able to do, through

1 that attempted objectivity, is you're not able to
2 have a baseline comparison to the state of the
3 property or the state of the objects at the time of
4 the actual incident.

5 Isn't that correct?

6 A. Correct. That would introduce any type of bias
7 into the report or the graphic.

8 Q. So ideally for you, you would get out to the
9 scene of an incident, or alleged crime, almost
10 immediately after the alleged incident.

11 Isn't that right?

12 A. No. There are some cases where we will respond
13 out several years after the incident occurred.

14 The laboratory also will take a position to
15 provide an unbiased -- if there, for instance, is an
16 instance of a color of law shooting, where the
17 laboratory will go in and conduct an examination to
18 provide, again, an unbiased approach based on the
19 scene or based, maybe, on a vehicle that was secured.

20 Q. Okay. Let me ask you this.

21 You were discussing H2, and I believe it's
22 I1, which is the impact site on the television.

23 Your conclusion about the trajectory would
24 change if the -- if the position of the television
25 was moved.

1 Isn't that right?

2 So if the television was in a different
3 place, that would affect your analysis of the
4 trajectory, wouldn't it?

5 A. If the TV was located in a different area, not
6 within the path of that bullet, yes. That would
7 cause some question of, Well, could it have been
8 moved?

9 Q. You have no way of knowing if the TV was in the
10 same place on August 22, 2019, as it was on May 5,
11 2018, when the incident took place, do you?

12 A. I have no information about that.

13 Q. And you have no way of saying that the trailer
14 that you observed on August 22, 2019, was in the same
15 place as it was on May 5, 2018, at the time of the
16 alleged incident, do you?

17 A. No information about that as well.

18 MR. ELSENHEIMER: Nothing further,
19 Your Honor. I'll pass the witness.

20 THE COURT: All right. Thank you.

21 Ms. Wilson, do you have any redirect?

22 MS. WILSON: No, Your Honor.

23 THE COURT: All right. May this witness be
24 excused from this hearing?

25 MS. WILSON: Yes, Your Honor.

1 THE COURT: All right.

2 Thank you for your testimony today,
3 Mr. Chavez.

4 THE WITNESS: Thank you.

5 THE COURT: So that concludes the testimony
6 we'll be hearing today.

7 I don't really require any additional
8 argument.

9 One of the things that I wanted to ask you
10 about today -- I guess we won't really have time to
11 get to -- to respond, at least verbally today, so I'm
12 going to ask you to respond in writing.

13 And what I was a little bit curious about,
14 because the government had supplemented its -- what
15 was the issue of the statements that the government
16 wanted to submit, you did -- you confused me a little
17 bit. I wasn't quite sure exactly what, in the
18 transcript, you intend to at least try to admit.

19 So what I'd like you to do is, I'd like the
20 government to submit a transcript that is highlighted
21 with the statements that they want to ask the Court
22 to admit.

23 And then I would like the defense to
24 respond with its own highlighting, so that I can look
25 at that and make a decision without having to take

1 any more of your time in -- in a hearing.

2 That's the -- that was the crux of my
3 question. I just wanted to make sure I know what
4 statements exactly the government seeks to admit, and
5 then what the defense feels needs to be added for
6 completion.

7 So can you do that, Ms. Wilson, say, in
8 ten days?

9 MS. WILSON: Yes, Your Honor. Ten days
10 would be fine. Thank you.

11 THE COURT: All right.

12 And then, Mr. Elsenheimer, you can respond
13 with your highlighting -- and, what should -- five
14 additional days, ten days? What do you think?

15 MR. ELSENHEIMER: I think five would be
16 fine. If I need more time for some reason I'll
17 submit a request. But I'll do my best to get it in
18 five.

19 THE COURT: All right. So let me see.

20 The government's in ten days, and then the
21 defense has five days to respond unless a request
22 comes for additional time.

23 Mr. Elsenheimer, you look like you have
24 something you want to say.

25 MR. ELSENHEIMER: No.

1 THE COURT: No? Okay.

2 MR. ELSENHEIMER: I think it's because of
3 the way that the camera is positioned that makes me
4 look like I'm --

5 THE COURT: You're itching to say things.

6 MR. ELSENHEIMER: Well, I usually am.

7 THE COURT: Yeah. Right. It all makes
8 sense.

9 I don't have anything else that I need to
10 ask you to clarify today. So unless there's
11 something that you all want to bring to the Court's
12 attention, I will work diligently on getting this
13 finalized and get my ruling to you all, of course,
14 once I see what the transcript looks like.

15 So -- all right?

16 MR. ELSENHEIMER: Could I ask,
17 Your Honor --

18 THE COURT: Yes.

19 MR. ELSENHEIMER: Just in terms of a trial
20 setting, just so we can kind of gauge for ourselves,
21 are we thinking -- I know that everything is up in
22 the air, so everything is with the caveat that things
23 could get shut down again because of the pandemic.

24 But is Your Honor thinking January,
25 February, later into the spring?

1 THE COURT: Well, I don't have a specific
2 time frame just yet. Clearly, it's not going to be
3 this year.

4 And then the reality is that right now we
5 have one jury courtroom that all of us are sharing in
6 the Northern District. We -- we may try to come up
7 with a second courtroom, but we're not there yet. So
8 that, of course, affects everything. And that's one
9 of the reasons why I say it's not going to be this
10 year.

11 And then of course as you pointed out,
12 Mr. Elsenheimer, the way this virus is -- is -- you
13 know, it just seems to be that we're getting more and
14 more people that are testing positive.

15 So I -- I don't know what to tell you
16 exactly. I will tell you that there are cases that
17 probably have priority over this one, because your
18 defendant is not in custody.

19 So once we are able to start getting cases
20 tried, I think we're all going to be pretty backed
21 up, and I think we're going to be interested in
22 getting cases tried where defendants are in custody.

23 But as -- so I'm just basically telling you
24 the various considerations that go into it. And it
25 won't be this -- this year. But I -- it might be

1 spring of next year. That might happen.

2 And I'm looking at Yvonne to see if she's
3 going to shake her head and tell me that I'm out of
4 my mind, but she's not. So...

5 But here -- but here is my plan. You know,
6 once I -- once I have a ruling on these motions, and
7 once it looks like things are maybe -- not calming
8 down, but once I feel like I'm in a position where
9 maybe we all need to seriously plan, I will have a
10 status conference so that we can try to figure out
11 dates and availability of witnesses and things of
12 that nature.

13 So I promise I won't spring it on you, but
14 I don't think it's going to be in the next few
15 months.

16 MR. ELSENHEIMER: Thank you, Your Honor.

17 THE COURT: Sorry I can't --

18 MR. ELSENHEIMER: No, no problem at all. I
19 completely understand. I'm just curious.

20 THE COURT: Yeah. And ask any time. I
21 mean, I don't mind questions like that. It's fine.

22 All right. Well, thank you all for your
23 appearances today. Thank you for your presentations.

24 I'll take the matter under advisement, and
25 we'll be in recess.

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(Proceedings concluded at 12:06 p.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Date: November 13, 2020

PAUL BACA, RPR, CCR
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